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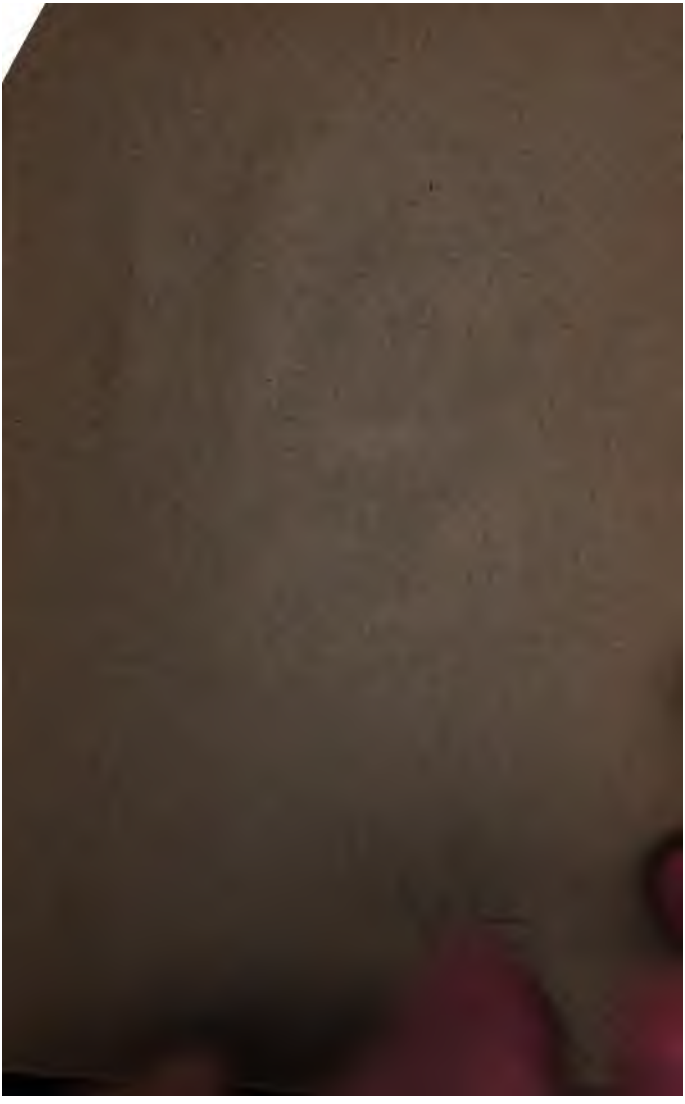

MANUAL

OF

AMERICAN MINING LAW

AS PRACTICED IN THE

WESTERN STATES AND TERRITORIES.

EMBRACING A COMPILATION OF THE

TEXT OF THE UNITED STATES STATUTES, LAND-OFFICE REGULATIONS AND DECISIONS, AND THE LOCAL STATUTES OF CALIFORNIA, COLORADO, NEVADA, DAKOTA, WASHINGTON, WYOMING, NEW MEXICO, AND ARIZONA.

BY

W. P. WADE,

AUTHOR OF "LAW OF NOTICE," AND "RETROACTIVE LAWS."

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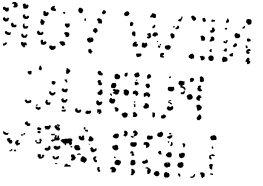

PREFACE.

The object I had in view in preparing this little book for publication, was to present the practical questions that interest the mining lawyer, as well as the miner, in a clear and succinct form, for reference. The reasons I have to offer for not presenting the same matters in the form of a law book of standard size, are, that such a book, while more expensive, would be but little better, except for the student; and the changes in local laws, as well as the decision of questions now regarded as unsettled, would render a new edition necessary within so short a time that the expense of a large book might prove an unnecessarily onerous tax. The form adopted is also convenient for transportation, which is a feature worth considering in many judicial circuits where this class of litigation predominates. I hardly think the subject of *American* mining law, ripe for elaborate treatment in a standard text book. The following pages have been prepared with a view to accuracy. The propositions are stated with necessary brevity, as it is taken for granted that the practitioners will in general consult the authorities referred to.

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A MANUAL

OF

AMERICAN MINING LAW.

ANNOTATED.

CHAPTER I.

THE RULES AND CUSTOMS OF MINERS.

SECTION 1—Origin of miners' rules and customs.
2—Rules and customs recognized by the courts.
3—Recognition by Congress.
4—Paramount authority of acts of Congress.
5—Existence of custom, question of fact.
6—Whether custom is in force.
7—Same—Conflict between rules and customs.
8—Pleading.
9—Construction of local customs.
10—Rules and customs affected by state laws.

§ 1. **Origin of miners' rules and customs.**—The Government of the United States, holding the only title to the public lands, is the paramount proprietor, and exclusive rights to occupy and explore any portion of the unoccupied domain of the general government, in the search for precious metals, must be derived either from the direct or tacit consent of such proprietor, we would naturally seek for the foundation of such rights as miners originally claimed to have acquired to portions of

the public mineral lands, in antecedent acts of Congress. But long prior to any legislation upon the subject, the exploration and development of the mines were commenced, under circumstances which rendered impracticable an appeal to positive law, to determine the conflicting rights of those engaged in such enterprises. Aside from the fact that the rights asserted were of a nature so novel to our jurisprudence that the principles of the common law were found to apply but imperfectly, the scene of contention was in a locality unprovided with the judicial machinery necessary to a regular legal trial of the merits of conflicting claims. Necessity, therefore, compelled the miners to form voluntary associations, and adopt such *rules* as were necessary for the government of the camp or the district. These were, and still are, denominated *District Rules*. But even these rules, which were usually reduced to writing, and recorded in books kept for that purpose, were not always sufficiently comprehensive in their scope to meet the exigencies of every case. It therefore became necessary at times to appeal to the customary usages of a mining district to settle a question of disputed right. These usages thus received such sanction as could be given them at the time, by general acquiescence, and came to be regarded as of sufficient validity to furnish a rule of action at least for cases not comprehended in the body of written rules. These usages will be mentioned hereafter as *Miners' Customs*. The rules and customs will be considered together, for the reason that it is difficult to tell which of the two —*rules* or *customs*—are of paramount authority.

§ 2. **Rules and customs recognized by the courts.** —As often as these rules and customs have been brought into question in the courts, they have been sustained by judicial authority, in so far, at least, as they were found *sonable and not* in conflict with positive law, and

when clearly established have been generally, if not universally, recognized as fixing the rights of all those within the district where the rule or custom in question was in force, as definitely as could be done by statute.[1] And it will be seen by consulting the authorities that this recognition of mining rules and customs is independent of any statutory provision acknowledging their validity. The reason of their recognition is well expressed in the opinion delivered in *King* vs. *Edwards*:[2] "The mining customs of any particular mining district have the force and effect of laws, or in other words are law * * * as effectual as acts of Congress, for they are the American common law on mining for precious metals."[3]

1 Hicks vs. Bell, 3 Cal. 219; Fairbanks vs. Woodhouse, 6 Cal. 434; Jenny Lind Co. vs. Bower, 11 Cal. 194; English vs. Johnson, 17 Cal. 106; Brown vs. '49 & '56, &c. Co., 15 Cal. 152; Gore vs. McBrayer, 18 Cal. 583; Coleman vs. Clements, 23 Cal. 245; St. John vs. Kidd, 26 Cal. 263; Bradley vs. Lee, 38 Cal. 362; Strong vs. Ryan, 46 Cal. 33; Robertson vs. Smith, 1 Mont. 410; Belk vs. Meagher, 3 Mont. 65; Smith vs. North American M. Co., 1 Nev. 123; Leet vs. John Dare Silver M. Co., 6 Nev. 218; Golden Fleece vs. Cable Con. M. Co., 12 Nev. 312; Cases cited *infra*; Sparrow vs. Strong, 3 Wall. 104; Basey vs. Gallaghear, 20 Wall. 670; Atchison vs. Peterson, 20 Wall. 507.

2 1 Mont. 235.

3 See remarks of Senator Stewart, of Nevada, on common law of miners and origin of rules and customs, 3 Wall. 100, 777.

§ 3. **Recognition by Congress.**—Though no formal acknowledgment of the existence and force of these rules and customs was ever made by the national legislature until as late as the year 1866,[1] yet mineral lands had already been expressly reserved from sale, except as specially provided for by law.[2] And in the previous years there had been, if not a recognition of the prevailing rules and customs under which mining was carried on, at least a recognition by Congress of the fact that the *public lands* were occupied for such purposes, and a

distinct acknowledgment of the possessory rights acquired by miners under these rules and customs.[3] When, in 1872, the first section of the act of July 26, 1866,[4] was repealed, by the substitution of a section of the Revised Statutes of substantially the same import,[5] the recognition of these local rules and customs was not omitted. But it will be observed that, by the act of 1872, which embodies most of the congressional legislation upon the subject, and will be found fully set out in another place,[6] many provisions were made for the determination of miners' rights, with respect to matters theretofore left entirely to regulation by the miners themselves.

1 Act of Congress July 26, 1866.—"§ 1. The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intentions to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

2 Act of Congress July 4, 1866.—Rev. Stat. U. S. § 2318; *post*, p. 13.

3 Act of Congress February 27, 1865.—"§ 9. No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." Rev. Stat. U. S. § 910.

4 *Supra.*

5 Rev. Stat. U. S. § 2319; *post*, § 12 *et seq.*, p. 13.

6 Title xxxii, Chapter 6, Rev. Stat. U. S.; *post*, § 12, p. 12.

§ 4. Paramount authority of acts of Congress.—In so far as these provisions extend, they entirely supersede all mere local regulations upon the same subject, and abrogate all those in conflict. The ownership of the property, with respect to which the license to occupy is given, necessarily gives the federal government the para*mount right* to fix the terms upon which it shall be occu

pied and appropriated, and but for the provision which occurs in several places in the federal statute, subjecting the rights of miners upon the public domain to the local law of the state or territory in which the public lands lie,[1] it would be doubtful whether they could be affected by other than congressional legislation, except as they might be indirectly operated upon by the state legislature in the exercise of the police and taxing powers of the state. The statutory recognition of these rules and customs, it will be observed, is, in every instance, qualified by substantially the same proviso, by which the courts have from the first reserved the right to declare them void—that they should not be contrary to positive law. Therefore, when a local mining rule is invoked to defeat the title of the United States, or of one holding under a patent granted in pursuance of the laws of the general government, it will be held ineffectual.[2]

1 "* * * Under regulations prescribed by law, and according to the local customs," etc. Rev. Stat. U. S., § 2319. "* * * Shall be governed as to length along the vein or lode by the customs, regulations and laws in force," etc. Rev. Stat. U. S. § 2320. "* * * So long as they comply with the laws of the United States, and with state, territorial and local regulations, not in conflict with the laws of the United States governing their possessory title," etc. Rev. Stat. U. S. § 2322. Basey vs. Gallaghear 20 Wall. 670; Golden Fleece Co. vs. Cable Co., 12 Nev. 312.

2 Fremont vs. Seals, 18 Cal. 433; Yosemite Valley Case, 15 Wall. 77; Prosser vs. Parks, 18 Cal. 47.

§ 5. **Existence of custom, question of fact, Evidence.**—Whether there is a custom, or a distinct rule, is a fact, like any other to be established by the best evidence.[1] And in one case, at least, it has been held that a transcript from the record books in which the rules were copied by a designated officer, could not be offered in evidence upon the strength of such authentication as it might *receive from* a certificate of the custodian. It was

decided that the correctness of the transcript must be established by evidence *aliende*.[2] The book of rules itself, however, is competent evidence to prove that the rule had been adopted,[3] though this proposition was, in one case, qualified by the statement that it was good *secondary* evidence of a sale.[4] It is probable that the book of rules, when properly identified, would be the best evidence; but where parol evidence had gone in without objection that it was not the best evidence, and the written rule was subsequently introduced, it was held no error to allow both to go to the jury.[5] The evidence of customs is the same as is requisite to establish any kind of custom. The custom to be primarily established is a local one; but in the absence of any local custom controlling the matter in controversy, a general custom may be proven. It is held, however, that a general custom cannot be established by proof of local customs in other districts,[6] by a court of high authority in mining matters.

1 Sullivan vs. Heuse, 2 Col. 424; King vs. Edwards, 1 Mont. 235.
2 Roberts vs. Wilson, 1 Utah 292.
3 Orr vs. Haskell, 2 Mont. 225; Harvey vs. Ryan, 42 Cal. 626.
4 St. John vs. Kidd, 26 Cal. 263.
5 Colman vs. Clements, 23 Cal. 245.
6 T. M. Tunnel Co. vs. Stranahan, 31 Cal. 387.

§ 6. **Whether custom is in force.**—It is not sufficient to show that a custom had prevailed, or that a certain rule was adopted. It devolves upon any one invoking the aid of either custom or written rule, to show that it is still in force, if such an issue is made.[1] The rule to affect the right must have been in force at the time the right was acquired, or the acts done by virtue of which it is claimed, as these rules cannot have retroactive operation;[2] though it was held, in one case, that a subsequent rule might be given in evidence to show by what right the party claimed, the effect of such evidence being

properly guarded by instructions to the jury.[3] For obvious reasons the force and effect of a mining *custom* does not depend upon its antiquity any further than that it shall cover the time when the location was made, or other act done which it is intended to control.[4]

1 Pralus vs. Jefferson, G. & S. M. Co., 34 Cal. 558; Harvey vs. Ryan, 42 Cal. 626.
2 T. M. Tunnel Co. vs. Stranahan, 31 Cal. 387.
3 Roach vs. Gray, 16 Cal. 383.
4 Smith vs. North American M. Co., 1 Nev. 123.

§ 7. **Same—Conflict between rules and customs.** —In this connection the relative value of *rules* and *customs* come up for consideration, as they operate to abrogate each other. Under a state statute[1] authorizing proof "of the customs, usages, or regulations, established and in force at the bar or diggings, embracing such claims," and declaring that "such customs, usages and regulations * * * shall govern the decision of the action," it was held that no distinction was made between the effect of a "custom" or "usage" the proof of which rested in parol, and a "regulation" adopted at a miners' meeting and embodied in a written local law.[2] The reason assigned for this ruling is that the district laws acquire their force not from mere enactment, but from the customary obedience and acquiescence of the miners within the district. It is further laid down in the same case that mining *customs* will prevail over prior conflicting rules that have fallen into disuse and are disregarded by the miners.[3] The only advantages a written rule has over a custom of this kind seems to be the facility with which it may be proved, and a sort of presumption in favor of its remaining in force. Thus it is said in another case: "The written laws of the district, which presumptively were in force, required work in the district * * * *If any* other custom had grown up

in that district * * * it devolved upon the appellant to show it, as this would be considered an amendment to, or modification of, the former custom."[4] This places both upon the common footing of recognized usages, and gives effect to the latest. This being the case, it would be safe to say that a written rule adopted at the miners' meeting, as an expression of their acquiescence, would abrogate a previous custom among the miners of the district. It has also been held that general recognition of a miner's right to a claim will give him a good title where the location was not made in strict accordance with local rules.[5]

1 California Practice Act, § 3, p. 621.
2 Harvey vs. Ryan, 42 Cal. 626.
3 *Ibid.*
4 King vs. Edwards, 1 Mont. 235.
5 Kinney vs. Consolidated Va. M. Co., 4 Sawyer, 382; Harris vs. Equator M. & S. Co., 2 Col. Law Rep. 63.

§ 8. **Pleading.**—Whether the rule or custom must be specially pleaded, depends, in a great measure, upon the code provisions, or the practice of the different states and territories. But, in general, it is deemed sufficient under the code to allege that the property is claimed "by virtue of full compliance with the local laws and rules of miners," etc. And in California it has been decided that rules and customs may be shown when not specially pleaded, in support of an allegation of ownership.[1] This, however, is somewhat modified as a rule of decision by a much later case in the same court. The modification or qualification, goes to the object for which the mining rule is invoked. Where the custom is relied upon by defendant for the purpose of showing a forfeiture by plaintiff, it is held that it should be specially pleaded.[2] It is admitted in this case that *abandonment*, having the effect to leave the land entirely unoccupied, might be

shown under the general denial. "But," says NILES, J., in delivering the opinion of the court, "the occupant of a mining claim does not lose his right of possession absolutely by a failure to comply with one or more of the local mining laws, although these laws declare a forfeiture as the result of such non-compliance. He may still remain in possession, under his original location, and is entitled to possession until such time as another shall enter and locate the ground in the manner prescribed by the mining laws, and avail himself of the default of the prior occupant. A defense based merely upon forfeiture does not involve a denial of the plaintiff's possession or right of possession, at the date of defendant's entry."[3]

1 Coleman vs. Clements, 23 Cal. 245.

2 Morenhaut vs. Wilson, 52 Cal. 263.

3 In this case the contrary views expressed in Bell vs. Brown, 22 Cal. 681, are expressly noticed and overruled.

§ 9. **Construction of local customs.**—In construing these local regulations and usages, for the purpose of determining their validity, force, and application to particular cases, courts will not look narrowly into the regularity of the proceedings of the miners' meeting by which they were adopted and promulgated. It is sufficient if it appear that the rule was agreed to by the miners, assembled on due notice, and they will only be disregarded for fraud, not on account of clumsiness of methods by which the expression was obtained.[1] And even the alteration of one of several rules, after they have been passed and reduced to writing, does not affect the validity of the others.[2] Courts will examine and construe rules and customs for the purpose of ascertaining their meaning,[3] and when their meaning is reasonable, and not in conflict with the law, such rules and customs must be strictly pursued.[4] For the reason that forfeitures are odious, they are construed *strictly against* such a conclusion.[5] Local

rules have been sustained as reasonable, which provided for the amount of work to be done on a claim in order to hold it;[6] how claims are to be located;[7] requiring a notice of location to be posted on or near the claim,[8] and requiring a renewal of notice, under penalty of the claim being considered as abandoned.[9]

1 Gore vs. McBrayer, 18 Cal. 583.
2 T. M. Tunnel Co. vs. Stranahan, 31 Cal. 387.
3 Fairbanks vs. Woodhouse, 6 Cal. 434.
4 Oreamuno vs. Uncle Sam M. Co., 1 Nev. 215; Gleeson vs. Martin White M. Co., 13 Nev. 443; St. John vs. Kidd, 26 Cal. 263.
5 Colman vs. Clements, 23 Cal. 245.
6 Bradley vs. Lee, 38 Cal. 362; King vs. Edwards, 1 Mont. 235; Leet vs. John Dare Silver M. Co., 6 Nev. 218.
7 Mallet vs. Uncle Sam M. Co., 1 Nev. 188.
8 Harvey vs. Ryan, 42 Cal. 626.
9 Strong vs. Ryan, 46 Cal. 33.

§ 10. Rules and customs affected by state laws.— In many of the details for carrying into execution the laws in regard to mining upon the public domain, Congress has delegated the power to legislate to the law-making powers of the states and territories in which the mineral land is situated. So far as this power is exercised it supersedes or abrogates the district rules, saving all rights previously acquired. But these district rules and customs have been recognized by local legislatures.[1] The construction of state and territorial legislation will receive attention in subsequent chapters, where a large part of the mining laws now in force of the several mining states and territories will be found compiled and arranged.[2]

1 Laws of Nev. Ter. p. 16, § 4, and p. 21, §§ 74, 77.
2 *Post*, Ch. xv.

CHAPTER II.

LAWS OF THE UNITED STATES NOW IN FORCE.

SECTION 11—Arrangement of subsequent chapters.
12—Referring to Title xxxii, Chapter 6, and Title xiii, Chapter 17, Revised Statutes of the United States.
13—Referring to the repeal provisions of the Revised Statutes of the United States.

§ 11. **Arrangement of subsequent chapters.**—Having introduced the subject by a brief consideration of miners' common law, it is now proposed to give the acts of Congress, with the construction their provisions have received from the courts. Some portions of the federal statutes have been repealed, and others substituted by new enactments. The order in which it is intended to present the mining law, rules and decisions, in this and subsequent chapters, is as follows:

First. The laws of Congress now in force. *Second.* The judicial construction of the federal law governing (1) lode claims; (2) tunnel rights; (3) placer claims; (4) mill sites; (5) timber; (6) easements; (7) coal lands; (8) homesteads and town sites in mineral districts; (9) patent. *Third.* Land office regulations; (1) the rules; (2) decisions of the executive department. *Fourth.* The local law; (1) miners' rights and remedies under (2) local statutes.

§ 12. **Referring to Title xxxii, Chapter 6, and Title xiii, Chapter 17, Revised Statutes of the United States.**—Some of the repealed portions of the federal law have been noticed in the preceding chapter. As rights were acquired under those provisions which became the *subject of subsequent* litigation, and all of such

rights were expressly saved by the repealing act, or by a general provision in the Revised Statutes,[1] it may be necessary to refer to some of them from, time to time, in which event they will be properly cited or set out. But as the Revised Statutes contain, under the above titles and chapters, nearly the entire body of national legislation upon the subject of mining, I deemed it expedient to insert these portions with amendments, in the order in which they are arranged in the 1878 edition of the revision, so that it may be conveniently referred to.[2] The statutes referred to are too voluminous to be inserted in a note, so they will follow as the remainder of this section.

1 *Post*, § 13, p. 29; Rev. Stat. U. S. § 5597 *et seq.*

2 In the following pages I have preserved the original synopsis of sections, and interpolated amendments in the same form as they were added in the statutes, in cases where they were enacted in time to obtain insertion. The object of doing this in this manner, was to present the body of the law in a condensed form, thereby materially enhancing its value for purposes of reference, and at the same time save space which might have been needlessly taken up by frequently copying portions of the statute in order to show the application of the judicial construction.

REVISED STATUTES OF THE UNITED STATES.

TITLE XIII, CHAPTER 17.

§ 910. No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie, is in the United States; but each case shall be adjudged by the law of possession. (Act of Congress Feb. 27, 1865, § 9).

TITLE XXXII, CHAPTER 6.

MINERAL LANDS AND MINING RESOURCES.

SECTION 2318—Mineral lands reserved.
2319—Mineral lands open to purchase by citizens.
2320—Length of mining claims upon veins or lodes.
2321—Proof of citizenship.

SECTION 2322—Locator's right of possession and enjoyment.
2323—Owners of tunnels, rights of.
2324—Regulations made by miners, tunnels, cost of, how treated.
2325—Patents for mineral lands, how obtained.
2326—Adverse claims, proceedings on.
2327—Description of vein-claims on surveyed and unsurveyed lands.
2328—Pending applications; existing rights.
2329—Conformity of placer-claims to surveys, limits of.
2330—Sub-division of ten-acre tracts, maximum of placer locations.
2331—Conformity of placer-claims to surveys, limitation of claims.
2332—What evidence of possession, etc., to establish a right to a patent.
2333—Proceedings for patent for placer-claim, etc.
2334—Surveyor-general to appoint surveyors of mining claims, etc.
2335—Verification of affidavits, etc.
2336—When veins intersect, etc.
2337—Patents for non-mineral lands, etc.
2338—What conditions of sale may be made by local legislatures.
2339—Vested rights to use of water for mining, etc., right of way for canals.
2340—Patents, pre-emptions and homesteads, subject to vested and accrued water rights.
2341—Mineral lands in which no valuable mines are discovered, open to homesteads.
2342—Mineral lands, how set apart as agricultural lands.
2343—Additional land districts, and officers, power of the President to provide.
2344—Provisions of this chapter not to affect certain rights.
2345—Mineral lands in certain states excepted.
2346—Grants of lands to states or corporations not to include mineral lands.
2347—Entry of coal lands.
2348—Pre-emption of coal lands.
2349—Pre-emption claims of coal land to be presented within sixty days, etc.
2350—Only one entry allowed.
2351—Conflicting claims.
2352—Rights reserved.

§ 2318. In all cases lands valuable for minerals shall reserved from sale, except as otherwise expressly di-ted by law. (Act of Congress July 4, 1866, Ch. 166, .)

§ 2319. All valuable mineral deposits in lands be-ging to the United States, both surveyed and unsur-ye1, are hereby declared to be free and open to explo-tion *and purchase*, and the lands in which they are

found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (Act of Congress May 10, 1872, Ch. 152, § 1.)

§ 2320. Mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. (Act of Congress May 10, 1872, Ch. 152, § 2.)

§ 2321. Proof of citizenship under this chapter may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. (Act of Congress May 10, 1872, Ch. 152, § 7.)

§ 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any *mineral vein, lode* or ledge, situated on the public

domain, their heirs and assigns, where no adverse claim exists, on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations; but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (Act of Congress May 10, 1872, Ch. 152, § 3.)

§ 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. (Act of Congress May 10, 1872, Ch. 152, § 4.)

§ 2324. The miners of each mining district may make *regulations, not* in conflict with the laws of the

United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four,[1] and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim, and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made: *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. (Act of Congress May 10, 1872, Ch. 152, § 5.) [That Section 2324 *of the Revised* Statutes be and the same is hereby

amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (Act of Congress Feb. 11, 1875.)] [That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, A. D. eighteen hundred and seventy-two.[2] (Act of Congress Jan. 22, 1880, § 2.)]

[1] The following is an amendment, approved June 6, 1874, which for some reason—probably a mistake—was omitted from the Revised Statutes: That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act, shall be extended to the first day of January, eighteen hundred and seventy-five.

[2] The amendment of 1880, of course, is not included in the revision from which this compilation is made.

§ 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such

notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists: and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. (Act of Congress May 10, 1872, Ch. 152, § 6.) [That where the claimant for a patent is not a resident of the land district wherein the vein, lode, ledge or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: And *provided*, that this section shall apply to all applications now pending for patents to mineral lands.[1] (Act of Congress Jan. 22, 1880, § 1.)]

[1] This amendment is inserted with the original section for the *convenience of* the reader.

§ 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever. (Act of Congress May 10, 1872 Ch. 152, § 7.)

§ 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the

claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim. (Act of Congress May 10, 1872, Ch. 152, § 8.)

§ 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. (Act of Congress May 10, 1872, Ch. 152, § 9.)

§ 2329. Claims usually called "placers," including all forms of deposits, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. (Act of Congress July 9, 1870, Ch. 235, § 12.)

§ 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts, and two or more persons or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, but no location of a placer claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser. (Act of Congress July 9, 1870, Ch. 235, § 12.)

§ 2331. Where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where, by the segregation of mineral lands in any legal subdivision, a quantity of agricultural land less that forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. (Act of Congress May 10, 1872, Ch. 152, § 10.)

§ 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. (Act of Congress July 9, 1870, Ch. 235, § 13.)

§ 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, *shall be paid for* at the rate of two dollars and

fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. (Act of Congress May 10, 1872, Ch. 152, § 11.)

§ 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter, and in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated, for the publication of mining notices in such district, and fix the rates to be charged by such paper; and to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office. (Act of Congress May 10, 1872, Ch. 152, § 12.)

§ 2335. All affidavits required to be made under this [illegible] may be verified before any officer authorized

to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given. (Act of Congress May 10, 1872, Ch. 152, § 13.)

§ 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection, for the purposes of the convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. (Act of Congress May 10, Ch. 152, § 14.)

§ 2337. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superfices of the lode. The owner of a quartz mill or reduction works not owning a mine in connection therewith, may also receive a patent for his mill site as provided in this section. (Act of Congress May 10, Ch. 152, § 115.)

§ 2338. As a condition of sale in the absence of necessary *legislation by Congress*, the local legislature of

any state or territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent. (Act of Congress July 26, 1866, Ch. 262, § 5.)

§ 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified, is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (Act of Congress July 26, 1866, Ch. 262, § 9.)

§ 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section. (Act of Congress July 9, 1870, Ch. 235, § 17.)

§ 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres, or they may avail themselves of the provisions of chapter five of this title, relating to homesteads. (Act of Congress July 26, 1866, Ch. 262, § 10.)

§ 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. (Act of Congress July 26, 1866, Ch. 262, § 11.)

§ 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter. (Act of Congress July 26, 1866, Ch. 262, § 7.)

§ 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-five, eighteen hundred and sixty-six. (Act of Congress July 9, 1870, Ch. 235, § 17; May 10, 1872, Ch. 152, § 16.

§ 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the states of Michigan, Wisconsin and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the states named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. (Act of Congress Feb. 18, 1873, Ch. 159, v. 17, p. 465.

§ 2346. No act passed at the first session of the Thirty-eighth Congress granting lands to states or corporations, to aid in the construction of roads or for other

purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. (Act of Congress Jan. 30, 1865.)

§ 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States, not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. (Act of Congress March 3, 1873, Ch. 279, § 1.)

§ 2348. Any person, or association of persons, severerally qualified as above provided, who have opened and improved, or who shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. (Act of Congress March 3, 1873, Ch. 279, § 2.)

§ 2349. All claims under the preceding section must be presented to the register of the proper land district, within sixty days after the date of actual possession, and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improve-

ment, filing must be made within sixty days from the receipt of such plat at the district office; and when the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months, shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. (Act of Congress March 3, 1873, Ch. 279, § 3.)

§ 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections, shall enter or hold any other lands under these provisions; and all persons claiming under section twenty-three hundred and forty-eight, shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. (Act of Congress March 3, 1873, Ch. 279, § 4.)

§ 2351. In case of conflicting claims upon coal lands, where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also when improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. (Act of Congress *March 3, 1873*, Ch. 279, § 5.)

§ 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached, prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver or copper. (Act of Congress March 3, 1873, Ch. 279, § 6.)

§ 13. Referring to the repeal provisions, United States Revised Statutes.—Mention has already been made of the saving clauses, by which prior rights are left unaffected by repeals and substitutions. These will be more clearly understood by consulting the following sections which have been compiled from the Revised Statutes:

TITLE LXXIV.

REPEAL PROVISIONS.

SECTION 5595—What Revised Statutes embrace.
5596—Repeal of acts embraced in revision.
5597—Accrued rights reserved.
5598—Prosecutions and punishments.
5599—Acts of limitation.
5600—Arrangement and classification of sections.
5601—Acts passed since December 1, 1873, not affected.

§ 5595. The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited as the Revised Statutes of the United States.

§ 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act

making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactments.

§ 5597. The repeal of the several acts embraced in said revision, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said act shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal in any manner affect the right to any office, or change the term or tenure thereof.

§ 5598. All offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect, as if said repeal had not been made.

§ 5599. All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made.

§ 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed.

§ 5601. The enactment of the said revision is not to affect or repeal any act of Congress passed since the *first day of December*, one thousand eight hundred and

seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith.[1] (Approved June 22, 1874.)

[1] This section gives full effect to the act of June 6, 1874. *Supra*, p. 17, note 1.

CHAPTER III.

LODE CLAIMS.

SECTION 14—Definition of lode.
15—Possession.
16—Possession prior to location.
17—What constitutes possession.
18—Character of possessory right.
19—Pleading possessory right.
20—Qualifications entitling persons to explore, occupy and purchase.
21—Discovery.
22—What must be discovered.
23—Manner of discovery.
24—Rights secured by discovery.
25—Location.
26—Survey, length, width, form.
27—Provisions as to recording, and herein of notice to subsequent purchaser.
28—What record to contain, description.
29—Annual labor.
30—Forfeiture.
31—Re-location of entire claims forfeited.
32—Re-location of claims forfeited to co-owner.
33—Abandonment.
34—Surface rights acquired by location.
35—Right to side veins.
36—Right to dip, apex.
37—Same—Veins uniting on the dip.
37*a*—Right to cross veins.

§ 14. Definition of lode.—The exact meaning of the "*lode, as used in* the acts of Congress, is nowhere

laid down in the statutes where it is employed, nor does it seem ever to have received a definition, from which considerable variation is not made by those using the word for practical purposes. It has been defined by geologists as a fissure in the earth's crust, filled with mineral matter, containing ores.[1] This would render the word synonymous with "fissure vein." In one case it is said to be "a Cornish word, nearly synonymous with vein."[2] But the geological definition is too narrow to be applied to the term as used in American mining law, and the manner in which it is disposed of in the case cited is too indefinite for practical purposes. Another definition, or rather description of a "quartz lode," is given as "a fissure or seam in the country rock, filled with quartz matter bearing gold or silver. This fissure may be wide or narrow," etc.[3] This is also open to objections, as being applicable only to a limited class of such ore deposits as were doubtless intended to be included. The term receives a somewhat broader signification in a later Nevada case, where it is applied to ore deposits, in a succession of chambers connected by a seam of varying width, and more or less barren of mineral, and where the boundaries or walls of such deposits were of different material.[4] These deposits would not conform to the description of a "fissure." But probably the best, and most practical explanation of what this word means, is given in a case decided in the United States Circuit Court, for the Ninth Circuit.[5] The opinion was delivered by Mr. Justice FIELD,[6] eminently qualified, not only by his acknowledged ability as a judge, but by intimate knowledge of mining interests, gathered from years of experience. In the course of the opinion the learned judge, after remarking that the term is always used in the statutes in connection with the word "vein," goes on to say: "*Any* definition of the term should, *therefore, be sufficiently* broad to embrace deposits of

the several metals or ores here mentioned. In the construction of statutes, general terms must receive the interpretation which will include all the instances enumerated as comprehended by them. * * * Cinnabar is not found in any fissure of the earth's crust, or in any lode as defined by geologists; yet the acts of Congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. * * * We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock." After noticing the geological definition above given, he makes, with approval, the following quotation from the testimony of Dr. Raymond, a witness in the case: "The miners made the definition first. As used by miners before being defined by any authority, the term lode simply meant that formation by which the miners could be led or guided. It is an alteration of the verb lead; and whatever the miner could follow expecting to find ore was his lode." If anything were needed to fortify the logical conclusion reached in this case, it might be said that many of the extensive mineral deposits discovered since the acts of Congress were passed were of a character not then known to exist. And while they vary widely from the character of fissures, they are still further removed from what were then known as placer diggings. It was necessary for purposes of location and working that they should be classified, as either *lode* claims or *placer* claims, and the fact that they were universally taken up in conformity to the law governing the former class of locations, was an unmistakable indication of what meaning was conveyed to the minds of the miners by the use of this familiar term in the acts of Congress.

[1] See Van Cotta's Treatise on Ore Deposits, Prince's translation, 26.

[2] *Bullion M. Co.* vs. *Croesus* G. & S. M. Co., 2 Nev. 168.

3 Foote vs. National Mining Co., 2 Mont. 402.
4 Phillpotts vs. Blasdel, 8 Nev. 61.
5 Eureka Con. M. Co. vs. Richmond M. Co., 4 Sawyer, 302.
6 *Ibid*, p. 310.

§ 15. **Possession.**—The first recognition by Congress of private rights to mineral lands on the public domain, is of a right based upon mere possession.[1] The language of this act, however, comprehends only the control of proceedings in United States courts, and requires that, in possessory actions, in the absence of any showing of superior right by virtue of compliance with the laws of the United States, prior possession shall be recognized as giving the better right. But it is a well recognized rule of decision in all courts, in controversies involving the title to mining property, that proof of prior possession makes a *prima facie* case for the claimant, which can only be overcome by proof of subsequent abandonment, or other divestiture, and the acquisition of a better right or title by his adversary.[2]

1 Rev. Stat. U. S. § 910, *ante*, p. 12.
2 Doran vs. Central Pac. R. Co., 24 Cal. 245; Kimball vs. Gearhart, 12 Cal. 28; Kelly vs. Natoma Water Co., 6 Cal. 105; English vs. Johnson, 17 Cal. 107; Sears vs. Taylor, 4 Col. 38; McCarron vs. O'Connell, 7 Cal. 152; Basey vs. Gallaghear, 20 Wall. 670. But this possessory right can only be asserted by citizens of the United States or those who have declared their intentions to become such—Golden Fleece M. Co. vs. Cable Cons. Co., 12 Nev. 327.

§ 16. **Possession prior to location.**— Not only may prior possession be invoked to restore one who has been ousted, or to secure one in the occupancy and enjoyment of a mining claim from which it is sought to eject him, but it will serve to protect one who has not yet taken the incipient steps to secure a mining claim—who has not at least accomplished the first essential requisite to a location by the discovery of mineral. The mere fact that he is in actual *possession of* a portion of the public domain,

prosecuting a search for mineral, gives him a right superior to anyone who may come upon the same ground for the same or any other purpose inconsistent with the possessory right of the first occupier.[1] And one in possession of such land for agricultural purposes may so hold it, subject only to the rights of others to enter in search of minerals.[2]

[1] Pennsylvania M. Co. vs. Owens, 15 Cal. 135; English vs. Johnson, 17 Cal. 107; Sears vs. Taylor, 4 Col. 38; McCarron vs. O'Connell, 7 Cal. 152; Crossman vs. Pendry, 1 Col. Law. Rep. 496; Stainінger vs. Andrews, 4 Nev. 159. But if one in possession stands by and allows others to enter and sink a shaft within his boundaries, and first discover mineral in rock in place, the law gives the mineral to the first discoverer. Crossman vs. Pendry, 1 Col. Law Rep. 496. Opinion by MILLER, J. (U. S. Cir. Ct.).

[2] Lentz vs. Victor, 17 Cal. 272.

§ 17. **What constitutes possession.**—The character of possession which will give the miner a right to the claim, independent of his location, pursuant to law or miners' rules, may be either actual occupation (*possessio pedis*), or constructive possession. When he claims the right to occupy without having any well defined boundaries or monuments, showing the extent and limits of his claim, his possession must be of the former kind, and must be shown by actual physical workings.[1] In one case it is stated that the possession of a mining claim need not be "the actual possession which is applied to agricultural lands, and which is understood to be *possessio pedis;*"[2] but this is only when the limits are defined by physical marks or monuments.[3] The possession will constructively extend to the limits of the claim when they are so defined,[4] or are fixed by mining regulations in force.[5] But mere assertion of title and marking the boundaries will not suffice. It must be actual occupation, a complete subjection to the will and control of the claimant.[6] Another *kind of constructive* possession is where one enters under

color of title, with no one claiming adversely. In such case his possession will extend to the limits fixed by his deed, regardless of whether it be a valid conveyance or not.[7] But possession under color of title cannot be shown to establish adverse possession where the deed is under a void judgment and execution sale,[8] but the entry must be made in good faith *under* the deed. A conveyance of an entire tract to one in possession of a part will not operate to extend his prior possessory rights to the whole of the tract.[9] But an insufficient description in the deed will be aided by a location certificate on record, which is referred to, and the possessory right will extend to the limits therein described, although the certificate be otherwise defective. This exception to the rule of strict conformity is made only in favor of purchasers.[10] The possession may be by one or more of several tenants in common, and will inure to the benefit of all.[11] But occasional occupancy for the purpose of prospecting will not constitute such possession as the law will recognize,[12] nor will work done for other than mining purposes give one a right to claim to the boundaries of a mining claim.[13]

1 Hess vs. Winder, 30 Cal. 349-55; Robinson vs. Imperial S.M. Co., 5 Nev. 44.

2 Atwood vs. Fricot, 17 Cal. 37.

3 Roberts vs. Wilson, 1 Utah, 292.

4 *Ibid;* Crossman vs. Pendry (U. S. Cir. Ct.), 1 Col. Law Rep. 496; Hicks vs. Bell, 3 Cal. 219; Weimer vs. Lowery, 11 Cal. 104; English vs. Johnson, 17 Cal. 107; Patterson vs. Keystone M. Co., 23 Cal. 575; Hawxhurst vs. Lander, 28 Cal. 331; Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 312.

5 Correa vs. Frietas, 42 Cal. 339; Hicks vs. Bell, 3 Cal. 219.

6 Robinson vs. Imperial, &c. Co., 5 Nev. 44-66; Murphy vs. Wallingford, 6 Cal. 648. But setting a stake with notice containing name of lode, date of discovery, and names of discoverers, and notice of intention to locate, held as equivalent to actual possession for the time allowed by law to complete the location.—Erhardt vs. *Boaro (U. S. Cir. Ct.), 1* Col. Law Rep. 497.

7 Green vs. Bates, 6 Cal. 263; Rose vs. Davis, 11 Cal. 133; Baldwin vs. Simpson, 12 Cal. 560; Keane vs. Carsenovan, 21 Cal. 291; Kile vs. Tubbs, 23 Cal. 431; Hicks vs. Coleman, 25 Cal. 122; McKee vs. Greene, 31 Cal. 418; Ayres vs. Bensley, 32 Cal. 620; Walsh vs. Hill, 38 Cal. 481; Hoag vs. Pierce, 28 Cal. 187; Atwood vs. Fricot, 17 Cal. 37.

8 Ahrens vs. Adler, 33 Cal. 608.

9 Wolfekill vs. Malajowich, 39 Cal. 276.

10 Harris vs. Equator, &c. Co., 2 Col. Law Rep. 63.

11 Waring vs. Crow, 11 Cal. 366; Patterson vs. Keystone M. Co., 30 Cal. 360; Mallet vs. Uncle Sam G. & S. M. Co., 1 Nev. 188; Mining Co. vs. Taylor, 100 U. S. 37.

12 Deer vs. McClintock, 31 Wis. 195.

13 Maxon vs. Williamson, 2 Mont 421.

§ 18. Character of possessory right.—Possession raises an inference of title.[1] A judgment roll showing that a party has prosecuted a suit to judgment against a trespasser, was held sufficient to rebut the presumption of abandonment, and his possession was held to continue and give him the better right until proof of subsequent abandonment or transfer.[2] It is also aided by a presumption in favor of its rightfulness.[3] It gives the one in possession a right not only to prevent others from entering to explore the ground for mineral, but from erecting superstructures as well.[4] It is property, and as such subject to execution;[5] may be transferred by deed or written agreement,[6] or by a mere transfer of the possession to another by verbal consent.[7] And when one was in possession at his death, it was held that his possession gave *prima facie* title to his heirs.[8] But no claimant who relies on prior possession alone has any right or title which he can assert against the United States or its grantee.[9]

1 Sears vs. Taylor, 4 Col. 38; Jackson vs. McMurray, *id.* 76; Burdge vs. Smith, 14 Cal. 380; Campbell vs. Rankin, 99 U. S. 261.

2 Richardson vs. McNulty, 24 Cal. 339.

3 English vs. Johnson, 17 Cal. 107; Kinney vs. Con. Virginia M. Co., 4 Sawyer, 382-450.

4 *Correa vs. Frietas*, 42 Cal. 339.

5 McKean vs. Bisbee, 9 Cal. 137; Forbes vs. Gracey, 94 U. S. 762.
6 Jackson vs. Feather River, &c. Co., 14 Cal. 18.
7 Kinney vs. Con. Virginia M. Co. 4 Sawyer, 382-453; McDonald vs. Bear River, &c. Co., 13 Cal. 220.
8 Gregory vs. McPherson, 13 Cal. 562.
9 Ah He vs. Crippen, 19 Cal. 491; Doran vs. Cent. Pac. R. Co., 24 Cal. 245; Heydenfeldt vs. Daney Gold, &c. Co., 93 U. S. 634.

§ 19. **Pleading possessory right.**—It is only necessary to aver that the party was in possession of the claim at a certain time, describing the property in dispute, and, where it is alleged in a complaint in ejectment, the subsequent ouster by defendant.[1] But when the plaintiff alleges title in fee, proof of prior possession of the property as a mining claim is held sufficient to sustain the averment.[2] Nevertheless, it has been held that the mere averment, in broad and general terms, of the prior possession of a tract of land including the claim in question, without alleging the character or extent of the possession was insufficient, at least to recover on the pleadings. The allegation should be that it was held as mineral land.[3]

1 Coryell vs. Cain, 16 Cal. 567.
2 Sears vs. Taylor, 4 Col. 38; Jackson vs. McMurry, *id.* 76.
3 Smith vs. Doe, 15 Cal. 100.

§ 20. **Qualifications entitling persons to explore, occupy and purchase mineral lands.**—The qualifications enumerated in the statute now in force,[1] are somewhat different in wording from the repealed section of the former statute;[2] but do not differ materially in the general purpose to confine the privileges of mining on the public domain to *citizens* and those who desire to become citizens by naturalization. The substituted section first in order of arrangement, provides for *purchase*, in addition to "exploration and occupation." The next section points out the manner in which citizenship may be proved, and by *necessary implication* includes in the classification of

qualified explorers, occupants and purchasers of mineral lands, corporations formed under the laws of the United States or any state or territory. The legality, or even the policy of such a restriction cannot be questioned, as it is only by comity that aliens are allowed to own real estate in any country.[3] In the early history of mining, on the Pacific coast, aliens were only allowed to work the mines, on condition of their paying a license tax. It was held that the state had power to impose such a license upon foreigners;[4] but that when such an one was employed by others, his employers were liable for the tax.[5] However, it was held that an alien in possession working a mining claim without license afforded no apology for trespassers, as the state alone could enforce the law and inflict the penalties.[6] It was also held that the Burlingame treaty[7] gave no greater privileges to the Chinese, respecting the acquisition of mining claims, than were enjoyed by other aliens.[8] But that the mere fact of a Chinaman's residing in a mining district did not subject him to the payment of the license fee.[9] The construction given to the first section of the act of July 26, 1866,[10] in one case was that it did not prohibit citizens who rightfully acquired the possessory title, from selling and transferring the same to aliens.[11] In the same case it was held that the law forfeiting claims held by aliens, to the territory, was in violation of the organic act, and void. There is no doubt that where a claim has been patented and thus becomes subject to the doctrine of *eminent domain*, with the powers to exercise it in the state, the right of an alien to own it would depend entirely upon state laws.[12] It is also true that the defect in a location, for the reason that the locator was an alien, may be cured by a subsequent declaration of intention, while he is still in possession of the claim.[13] So where *an alien* and a citizen make a joint location, and con-

vey by joint deed, before the rights of others intervene, the title will pass.[14] And it was held in the case cited, that a location by an alien and transfer to a citizen, before the intervention of others' rights, would pass a good title to the purchaser, notwithstanding that in the general land office it has been decided that the alien could convey no better title than he had, which was nothing.[15] It has also been held by high authority, that as between prior locators, who were aliens, and subsequent locators, who were citizens, the latter would prevail, and might enjoin the former from working the mine.[16] Following is the substance of provisions in the Revised Statutes, which determine *who are* and may become *citizens* by naturalization: Section 2165 provides for a declaration, under oath by the alien, to be made before any circuit or district court of the United States, district or supreme court of the territories, or court of record of any state, with common law jurisdiction, and having a seal and clerk, or before the clerk of any such court, that it is *bona fide*, his intention to become a citizen of the United States and renounce his allegiance to the prince or government of which he is a citizen or subject. After five years' residence and at least two years subsequent to the declaration, the applicant may perfect his naturalization by swearing to support the constitution and laws, and renouncing his former allegiance, as well as any title of nobility he may previously have held. By Section 2166, aliens who have resided one year in the United States and enlisted in either the volunteer or regular army of the United States, may be naturalized without previous declaration of intention. By Section 2167, alien minors, who have resided during three years of their minority, may be naturalized after completing their five years' residence, without previous *declaration. By Section* 2168, it is provided that in case

of the death of the declarant, before perfecting his naturalization, his widow and minor children shall be entitled to citizenship. By Section 2169, the aliens capable of naturalization are mentioned as free *white* persons, and persons of African birth or descent.[17] Section 2170 requires five years' continuous residence in the United States before the final application. By Section 2171 alien enemies are excluded. Section 2172 declares the minor children of naturalized aliens, citizens without the formality of naturalization, and also makes provision saving the citizenship of children born abroad, of native and naturalized citizens.[18] Section 2173 excludes the police court of the District of Columbia from the courts authorized to naturalize aliens. Section 2174 provides that three years' service as an American seaman on a merchant vessel will entitle a foreigner to citizenship. The question arises, whether the terms of this title may be rendered applicable to unmarried *women* who immigrate to this country after having attained their legal majority. It is believed that in a proper case the courts would find a way to extend the provisions of the mining law to such persons, as they have done, to give them the benefits of a similar statute donating public lands, by construing the words "single man" in their generic sense, to include unmarried women.[19]

[1] Rev. Stat. U. S. §§ 2319, 2321; *ante*, p. 13, 14.

[2] An act granting the right of way to ditch and canal owners over the public lands, and for other purposes. Approved July 26, 1866. § 1. "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

3 Brick vs. Caster, 4 Watts & S. 494; Runyan vs. Caster, 14 Pet. 122.
4 People vs. Nagler, 1 Cal. 232.
5 Meyer vs. Larkin, 3 Cal. 403.
6 Mitchell vs. Hagood, 6 Cal. 148.
7 16 U. S. Stat. at Large, 739.
8 Territory vs. Lee, 2 Mont. 124.
9 *Ex parte* Ah Pang, 19 Cal. 106.
10 *Supra.*
11 Territory vs. Lee, 2 Mont. 124.
12 2 Landowner, 115.
13 Osterman vs. Baldwin, 6 Wall. 122.
14 North Noonday Co. vs. Orient Co., 9 Reporter, 601.
15 3 Landowner, 18; North Noonday M. Co. vs. Orient M. Co., 9 Reporter, 601; SAWYER, J., in U. S. Cir. Ct., Dist. Cal.
16 Chapman vs. Toy Long, 4 Sawyer, 28. A corporation is a citizen, North Noonday M. Co. vs. Orient M. Co., *supra.*
17 It is under the restrictions of this clause that Chinamen are refused naturalization, being neither "white" nor African by nativity or descent.
18 Whether the party has complied with the requirements of this statute, or whether his father was naturalized, is a question of fact for the jury. North, &c. Co. vs. Orient M. Co. U. S. Cir. Ct. Dist. Cal., 9 Reporter, 601.
19 Silver vs. Ladd, 7 Wall. 219.

§ 21. **Discovery.**—This is the first act that goes to the acquisition of any right or title to a *lode claim* under the provisions of the United States law. According to the letter of the statute, the first in time as well as first in importance;[1] though it has been held that discovery subsequent to location would operate by relation to legalize acts which should have been done subsequent to discovery.[2] Prior to discovery of mineral, however, the only right that the miner can obtain is a possessory one, the value and conditions of which are treated in the preceding section. Until mineral is discovered, the prospector may hold possession of a piece of ground under the miners' common law,[3] but not under the laws of Congress. There being no legislative provision for the determination of the miners' possessory rights prior to discov-

ery, they would come under the rules and customs of miners. The only qualification required for a discoverer is that he shall be a citizen of the United States or shall have declared his intentions to become such.[4]

[1] Rev. Stat. U. S. § 2320, *ante* p. 14.

[2] North Noonday M. Co. vs. Orient M. Co. (U. S. Cir. Ct. Dist. Cal.) 9 Reporter, 601; Zollers vs. Evans, 1 Col. Law Rep. 217. But to perfect the location as originally made the subsequent discovery of mineral must be in the discovery shaft. Vanzandt vs. Argentine M. Co., 1 Col. Law Rep. 534.

[3] *Ibid.*

[4] Rev. Stat. U. S. § 2319, *ante*, p. 13; *supra*, § 20.

§ 22. **What must be discovered.**—It is not sufficient to constitute such a discovery as will warrant the location of a *lode claim*, that mineral is found. The mineral must be discovered in a vein or *lode*.[1] What is meant by the term "lode" we have already seen.[2] By "in place," which is always a necessary condition of the mineral in a lode claim, is meant, with reference to the rock in which the mineral is found, or the mineral itself, or both, that they are, when discovered, in the same place or position in which they were originally formed or deposited, as distinguished from loose, broken rock, or "float;" and from the mineral which by decomposition of the rocks, has been released, and is found in the wash, or loose earth and sand.[3] So far as the discovery is concerned, it is immaterial whether the rock contains a large or small percentage of mineral, or whether it contain gold, silver, cinnabar, lead, tin, and copper, or only one of the enumerated metals "or other valuable deposits" in appreciable quantities.[4] It has been said that one wall must be discovered. That "before such discovery can be called a discovery, at least one well-defined wall or side of the lode must be found."[5]

[1] Rev. Stat. U. S. § 2320, *ante*, p. 14; Overman S. M. Co. vs. Corcoran, 15 Nev. 147.

[2] *Ante*, § 15.

[3] Iron Silver M. Co. vs. Cheeseman, 1 Col. Law Rep. 461; Vanzandt vs. Argentine M. Co., *id.* 524.

[4] *Ibid.*

[5] Foote vs. National M. Co., 2 Mont. 402.

§ 23. **Manner of discovery.**—It is of no consequence by what methods, whether with much or little labor that the vein or lode is discovered. All the labor and improvements required by the law, follow the discovery. The vein or lode may be discovered at the surface in outcroppings, immediately below the "wash," or at any conceivable depth below the surface of the underlying rock, and it will be a good discovery upon which to base a valid location.

§ 24. **Rights secured by discovery.**—From the date of discovery, the claimant has certain rights respecting the lode, which are indefeasible except by the United States. He has a right, within such period, and subject to such regulations as may be fixed by the local law, to locate a claim on the lode; and this right is superior to any location made on a subsequent discovery of the same lode.[1] The maximum length of the location is fixed at 1,500 feet, and the maximum width at 300 feet on each side of the middle of the vein; and the minimum width to which claims may be limited by local regulations is fixed at 25 feet on each side of the middle of the lode. There seems to be no provision for limiting the length of claims by local regulation to less than 1,500 feet.[2] Within the limits prescribed, state and territorial legislatures and district associations may regulate so as to affect the value of the rights secured by discovery; but these local regulations by what authority soever established, cannot deprive the discoverer of the substantial benefits of his discovery, nor can he be deprived of such rights, by the entry of a trespasser, or one who, by force, *threats or other unlawful* means, prevents him from per-

fecting his right by locating the claim according to the local regulations prescribed.[3]

[1] And a discovery stake with notice of the claim is good constructive possession for the time allowed by local law to complete the location work. Erhardt vs. Boaro, 1 Col. Law Rep. 497.
[2] Rev. Stat. U. S., § 2320, *ante*, p. 14.
[3] Erhardt vs. Boaro (U. S. Cir. Ct.) 1 Col. Law Rep. 497.

§ 25. **Location.**—Following the discovery, the next step is the location of the claim. Prior to the acts of Congress governing this act of formal appropriation, the requisite things to be done were prescribed entirely by local rules or customs. Most of the details in this respect are still left to the state or territorial legislatures, or to be regulated by district rules.[1] But the section of the Revised Statutes cited contains a certain provision which was substantially embodied in an earlier act,[2] requiring that the location must be distinctly marked upon the ground so that its boundaries could be readily traced. Saving the provisions as to length, width, and form of claims, this is all there is of the general law now in force requiring formal acts of location. The act of 1866 cited required the locator to mark his claim at the point of discovery by a substantial stake, post, or stone monument, having described thereon the name of the discoverer or discoverers, and the name of the lode or vein, with the date of discovery. Also, that before recording, he should sink a shaft on the claim at least ten feet deep, or deeper if necessary, to find a well-defined crevice, or forfeit all right and title acquired by discovery.[3] By "distinctly marked on the ground," it is not to be understood that it is necessary to trace the boundary lines throughout their entire length, on the ground, or to erect fences or other substantial inclosures for that purpose. The accompanying words sufficiently designate the object of such mark-[illegible] and if the boundaries "can be readily traced," the

end will be attained and the means will not be closely inquired into. But marking a five-sided claim by posting a notice thereon, and marking three of its corners, was held insufficient to render the location valid.[4] And posting a notice on a tree at each end of the claim was also held insufficient.[5] It has been decided, however, that a line of stakes running lengthwise through the middle of the claim, distinctly marked and calling for so many feet on each side, was a sufficient compliance with this provision of the statute to determine the position of the side lines.[6] Where a party relies upon a location by himself or grantors, and fails to show possession, he must show a *valid* location, according to the laws in force or the rules and customs of miners.[7] But possession and use for a long time, with general recognition of the claim as located, have been held to cure defects in the location.[8] The right to the claim is primarily in those in whose names it was located, whether by their active co-operation or not, and even where their express consent is not shown.[9] It is also held that anyone authorized to locate a claim on the public domain may perform all the acts of appropriation through the agency of others.[10] So it was held that a claim might be located by a corporation.[11] Prior to the statute the amount of surface ground was regulated in general by its reasonableness, and if a larger amount in width was taken than was found to be reasonable, possession under the location was limited to the ground actually occupied.[12] And where a claim was found to be excessive it was held void for the excess; but setting the stakes a few feet farther apart than allowed by law, did not invalidate the entire claim.[13] Where a party was attempting to locate a claim, and was driven off by force, it was held that he had acquired a good possessory title against all persons.[14]

[1] *Rev. Stat. U. S.*, § 2324; *ante*, p. 15.
[2] *Act of Congress Feb. 9, 1866*, § 2.

3 *Ibid.* This section of the act was repealed by the act of 1872, which is embodied and set forth in the Revised Statutes. The requirements in the repealed section, not included in the subsequent act, are in most of the mining districts the subject of local legislation. The reader is therefore referred to subsequent pages containing the local regulations upon the subject of location. See *post*, Ch. xv, Local Statutes.

4 Hess vs. Winder, 30 Cal. 349.

5 Holland vs. Mt. Auburn, &c. Co., 53 Cal. 149.

6 North Noonday M. Co. vs. Orient M. Co., 9 Reporter, 601; Gleeson vs. Martin White, 13 Nev. 443. Posts or monuments at the corners and the center of end lines held sufficient. Southern Cross, &c. Co. vs. Europa M. Co., 15 Nev. 383.

7 Sullivan vs. Heuse, 2 Col. 424; Chapman vs. Toy Long, 4 Sawyer, 28.

8 Kinney vs. Con. Va. M. Co., 4 Sawyer, 382; Harris vs. Equator, &c. Co., 2 Col. Law Rep. 63.

9 Morton vs. Solambo C. & M. Co., 26 Cal. 527; Gore vs. McBrayer, 18 Cal. 583; Van Valkenburg vs. Huff, 1 Nev. 142.

10 Murley vs. Ennis, 2 Col. 300.

11 Whitman M. Co. vs. Baker, 3 Nev. 386.

12 Table M. T. Co. vs. Stranahan, 20 Cal. 198; *s. c.*, 21 Cal. 548.

13 Atkins vs. Hendree, 1 Idaho, 108.

14 Robinson vs. Imperial M. Co., 5 Nev. 14.

§ 26. **Survey, length, width, form.**— The "survey" here referred to is not that which is required in order to obtain a patent; but merely the measuring off of the claim by metes and bounds and courses and distances. It is not even necessary that it should be done by a surveyor, provided it conforms to the requirement that the boundaries shall be *distinctly marked*. Prior to May 2, 1872, when the provisions now in force governing the length of claims were enacted,[1] they were limited as to length, to 200 feet to the individual, or 3,000 feet to an association, with no definite limits as to width, beyond the provision that the locator should have a "reasonable quantity of surface for the convenient work-

the same as fixed by local rules."[2] But by the

gth is fixed at 1,500 feet. The lan-

guage of the statute does not seem to permit any variation from this by local legislation—certainly not to exceed this. But it has never been doubted that the locator may, within the prescribed limits fix the length at will. The width of claims is less definitely fixed by the the general law.[3] The maximum width being 300 feet on each side of the middle of the vein or lode, and the minimum, 25 feet, on each side. The only provision as to *form* is that the end lines shall be parallel.[4] and the claim shall be so many feet in length "along the vein."[5] There have been some land office decisions upon this subject which would serve no good purpose as guides to the judicial interpretation of the statute, for the reason that they are so vague and uncertain.[6] But as these decisions only affect the rights of applicants for patents they will be noticed elsewhere.[7] The provision that the claim shall follow the vein, seems to give great latitude as to the shape of the claim as surveyed. I might add further as to *width* that the construction which these provisions has received, is that these limits are not to be exceeded on *either* side, and that claims may be restricted to 25 feet on *either* side. So that if the locator in making his survey, found it impossible to take the full extent allowed by law or local regulation on one side, he could not make up the deficiency on the other. But the strict letter of the law as to width it has been found almost impracticable to observe, owing in a great measure to the uncertainty of the exact center of veins, even where the lode claim is taken upon what may be appropriately styled a *vein*. But the chief difficulty arises from the fact that lode claims are not in every instance located upon veins even approximately vertical in position. Many such are upon what are known as "flat," "blanket" or "horizontal" veins, which lie in such a position that it *would be impossible by* ordinary means to discover the

center at the surface. Many others are located upon discoveries of large deposits or chambers that do not conform in any respect to the common understanding of the term "vein," and of which so little was known when the law was enacted, that they could not have been contemplated by the law-makers when the statute was enacted. These peculiarities of formation have led the miners to rely upon the center of the discovery shaft or tunnel, as the proper point from which to measure the width of their claims, and locations made in this manner have generally been regarded as valid.

[1] Rev. Stat. U. S. § 2320, *ante*, p. 14.

[2] Act of Congress July 26, 1866. "§ 4. No location hereafter made, shall exceed 200 feet in length, along the vein for each locator, with an additional claim for discovery, to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules. *And provided further*, that no person may make more than one location on the same lode, and not more than 3,000 feet shall be taken in any one claim, by any association of persons."

[3] Rev. Stat. § 2320, *ante*, p. 14.

[4] Eureka, &c. Co. vs. Richmond M. Co., 4 Sawyer, 302.

[5] Zollers vs. Evans, 1 Col. Law Rep. 217; Vanzandt vs. Argentine M. Co., *id*, 524.

[6] That the form of a claim shall be *substantially* a parallelogram. *Sickel's Mining Rules & Dec.* 36.

[7] See *post*, Ch. xiv, *Land Office Decisions.*

§ 27. **Provisions as to recording and herein of notice to subsequent purchasers.**—There is nothing in the general law requiring a record to be made of the location; but the statute seems to take it for granted that this will be required by local laws or regulations.[1] When, however, such records are made, they are required to contain the name of the locator, the date of location, and such a description of the claim by reference to natural objects or permanent monuments as will identify the claim.[2] Whether it is necessary to record at

all, and within what time, in what office, by whom, and in what manner this record must be made, and the effect of the record is left entirely to local regulation, as will be observed by reference to the section of the statute cited.[3] But whatever effect the recording of the claim may be given by the local statute, as notice to subsequent locators; and whatever may be the consequences of failure to record, in the manner and within the time prescribed, when the local regulation requires a record to be made, it becomes an essential step in the acquisition of title.[4] A failure to record, however, will not ordinarily defeat the right of one in actual possession. It has been decided that the object of requiring a record of the claim, can be nothing more than is contemplated by the general recording acts of the states, to give notice to subsequent claimants of the same ground; and, where there has been a failure to record, prior to the subsequent location, notice by any other means, as by possession, would be sufficient.[5] Whatever be the time fixed within which the claim must be recorded, a failure to record within the time will not destroy the effect of the record as to subsequent claimants, if it be recorded before the subsequent location or purchase.[6] Failure to record a deed cannot be taken advantage of by a subsequent purchaser with sufficient knowledge or notice to put him upon inquiry,[7] or by one who is not a purchaser in good faith, and for a valuable consideration *paid*.[8] Unless the locator himself is required to enter his location on the records, his rights will not be affected by errors in the records.[9] The record when made will not be vitiated by the subsequent correction of errors in the description of the claim, or by erasing the name of one of the locators.[10] Ordinarily, all that is required of the locator is to deposit the necessary notice or certificate of location with the custodian of the records,

and when he has done this his act takes effect from that date, as though the instrument were entered on the records instantaneously.[11]

[1] Rev. Stat. § 2324; *ante*, p. 15; Southern Cross, &c. Co. vs. Europa M. Co., 15 Nev. 383; Golden Fleece Co. vs. Cable Co., 12 Nev. 312.

[2] *Ibid.*

[3] Golden Fleece M. Co. vs. Cable Con. Co., 12 Nev. 312.

[4] Pollard vs. Shively, 1 Col. Law Rep. 230; Faxon vs. Barnard, 1 Col. Law Rep. 145.

[5] Campbell vs. Rankin, 99 U. S. 261; Pollard vs. Shively, 1 Col. Law Rep. 230; Partridge vs. McKinney, 10 Cal. 181; Fair vs. Stevenot, 29 Cal. 486; Kinney vs. Cons. Va. M. Co., 4 Sawyer, 450. And a written notification posted on a stake set on the claim after discovery, but prior to location, has been held sufficient to warn others of the discoverer's intention to locate. Erhardt vs. Boaro (U. S. Cir. Ct.) 1 Col. Law Rep. 497.

[6] Faxon vs. Barnard, 1 Col. Law Rep. 145 (Decision by HALLETT, J., U. S. Cir. Ct., Dist. Col.)

[7] Lawton vs. Gordon, 37 Cal. 202; Dixon vs. Doe, 1 Smed. & M. 70; Priest vs. Rice, 1 Pick. 164; Williamson vs. Brown, 15 N. Y. 354; Clark vs. Trindle, 52 Pa. St., 492; Musgrove vs. Bonser, 5 Oreg. 312; Nute vs. Nute, 41 N. H. 60; Galland vs. Jackman, 26 Cal. 79; Myers vs. Spooner, 55 Cal. 257; Pollard vs. Shively, 1 Col. Law Rep. 230 (Opinion by ELBERT, C. J., Sup. Ct. Col., Dec. 7, 1880.) Wade on Notice, §§ 251-254, 273, *et seq.*

[8] Long vs. Dollarhide, 24 Cal. 218; Lasey vs. Simpson, 11 N. J. Eq. 246; Aubuchon vs. Bender, 44 Mo. 560; Setter vs. Alvey, 15 Kan. 157; Wade on Notice, § 226.

[9] Myers vs. Spooner, 55 Cal. 257; Kelly vs. Taylor, 23 Cal. 11; Merrick vs. Wallace, 19 Ill. 486; Riggs vs. Boylan, 4 Biss. 445; Oats vs. Walls, 28 Ark. 244; Throckmorton vs. Price, 28 Tex. 605; Franklin vs. Cannon, 1 Root (Conn.) 500; McDonald vs. Leach, Kirby (Conn.) 72; Alvis vs. Morrison, 63 Ill. 181.

[10] Gleason vs. Martin White M. Co., 13 Nev. 442.

[11] Harrold vs. Simons, 9 Mo. 326; Warnock vs. Wightman, 1 Brev. 339; Jarvis vs. Aikens, 25 Vt. 635.

§ 28. **What record to contain, Description.**— The name of the locator, so far as this statute controls the matter, may be inserted in any portion of the location

notice filed for record, provided it appears in such a way as to indicate for what it is inserted, and it is not at all essential that it shall be inserted by him or with his knowledge, provided it be not inserted fraudulently. The date of location will depend upon the local law prescribing the acts which must be performed in order to locate the claim. The date of location would properly be the date when those acts are completed. The most important requisite of the federal statute in respect of the record, is the *description*. It has already been stated that the law will be sufficiently complied with as to the boundaries of the claim, if when surveyed they are "distinctly marked on the ground," etc.[1] If this be done by substantial posts, stakes or monuments, these might be regarded as of sufficient permanence for reference in the record. The object of the description is identification, and whatever serves this purpose will be sufficient.[2] The provision that where vein or lode claims are upon surveyed lands, the description shall designate the location of the claim with reference to the lines of the public surveys,[3] applies only to the description in *patent surveys*, and has no connection with the section requiring a certain description in the record; yet where it is practicable, reference to section corners would be desirable. The following description in a bill of sale, was held sufficient to admit the paper in evidence, as the points mentioned might be well-known monuments: "Commencing at an oak bush near the gate of Meyers' cow-yard, running straight across the river to the head of the wing-dam put in by Owens & Co., in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line."[4] It is not necessary that the "natural object or permanent monument" should be such as the court would take judicial notice *of*. *Parol proof may* be introduced to identify the

claim by reference to the monuments mentioned in the description.[5] Reference to the discovery shaft, tunnel, corners, or permanent improvements on other claims have generally been held sufficient, as well as to particular natural and prominent objects in the neighborhood. But the reference must be sufficiently definite to serve the purpose of identification. The following description has for obvious reasons been held insufficient. "Situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law requires."[6]

[1] *Ante*, § § 25, 26.

[2] Phillpots vs. Blasdel, 8 Nev. 61. Description by reference to corner monuments, and well known claims by which it is bounded held sufficient. Southern Cross, &c. Co., vs. Europa M. Co., 15 Nev. 383.

[3] Rev. Stat. U. S. § 2327; *ante*, p. 19.

[4] Meyers vs. Farquharson, 46 Cal. 190.

[5] Began vs. O'Reilly, 32 Cal. 11; Reed vs. Spicer, 27 Cal. 57.

[6] Faxon vs. Barnard, 1 Col. Law Rep. 145.

§ 29. **Annual labor.**—The statute now in force was the first act of Congress requiring annual labor, or "assessment work," as it is commonly called, as a condition of holding mining claims on the public domain. It provides for two classes of claims: (1) those located prior to May 10, 1872, and (2) those located subsequent to May 10, 1872. The first require $10 worth of work to each 100 feet, and the latter $100 worth of work to each claim regardless of size.[1] Prior to the enactment of this law there was no general law on the subject. It was governed entirely by *district rules* or *local legislation*. The former when reasonable were sustained by the courts.[2] Where the labor required was useless, in that it was required to be done *in the district*, where the only labor, useful for the development of the claim must necessarily b[e] *done out of the district*, the rule was held unreasonable

applied to that case.[3] But where labor was allowed to be done outside of the district, it was held that it should have some direct application to the claim.[4] Where the rules required two days' labor out of every ten, it was held that labor expended in trying to get machinery on the claim, should, by fair intendment, be considered as work done on the claim.[5] By the amendment to Section 2324 of the Revised Statutes[6] owners of claims are permitted to perform the necessary labor by tunnels run for purposes of development. Where labor is to be performed within one year, in the absence of any time fixed for the commencement of the year, it has generally been understood as a year from the date of location, and there could be no forfeiture for failure until after that time had expired.[7] By the district rules the amount of labor was, I believe, generally fixed according to value, and in some districts the value of a certain amount of labor was arbitrarily fixed by rule; a rule requiring two days' labor in one year, was found to be the only labor requirement in one case.[8] By the act of May 10, 1872, the year for annual labor on claims thereafter located necessarily commenced with the date of location, and the work done under the local law, such as sinking a discovery shaft, etc., was counted as a portion of the first year's labor. But by the amendment of January 22, 1880,[9] the commencement of the year for claims subsequently located was fixed as the first day of January after the date of location. This excludes from consideration as part of the first year's work, that which was done for the purpose of completing the location. The proviso that this section shall apply to *all* claims located since the tenth day of May, 1872, is likely to lead to some confusion. It is capable of two constructions. (1) A *retroactive* construction, by which the work on prior locations done, according to the law as it then existed, *in the year 1879*, for the year ending with the anniver-

sary of the date of location, sometime in 1880, would be rendered ineffectual, and an additional $100 worth of labor be required prior to the first day of January, 1881; and by which claims so located upon which the annual labor had not been performed during the calendar year 1879, would be immediately subject to re-location on the passage of the act. (2) A *prospective* construction, by which the new law would only take effect as to claims already located with the beginning of the next calendar year after the passage of the act. The former construction would necessarily be based upon the conclusion that Congress intended to impose new obligations as a condition to the continued enjoyment of vested rights. The latter would be based upon the presumption that the object of the statute was merely to render these annual labor periods uniform, even though the owners of some of the previously located claims thereby were exempted from the duty of performing labor for a portion of one year. The latter construction, it is believed, is at least equally as reasonable as the former, and therefore, in the absence of a contrary judicial construction of this amendment to the statute, will be taken here as the correct one. "Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties, or will affect their antecedent rights, services or remuneration."[10] To give the statute a retrospective construction would be to deprive persons of *property*, "without due process of law," which would bring it in conflict with the constitution of the United States,[11] and render it inapplicable to claims already located, and thus defeat the manifest intention of Congress. However legitimate

may have been the fixing of the value of labor by district rules, so long as this requirement was one of purely local regulation, the force of any such rules or customs is entirely destroyed by the statute which fixes the value of the labor to be performed. What amount of labor on a claim would be worth one hundred dollars is a question of fact to be determined by evidence, and will be found to vary in different localities. A party is not required to perform annual labor after application for patent and payment for the land, for the reason that such payment gives him a vested right to the patent, which, when issued, relates back to the time when payment was made.[12]

1 Rev. Stat. U. S. § 2324; *ante*, p. 15.

2 King vs. Edwards, 1 Mont. 235.

3 *Ibid.*

4 McGarrity vs. Byington, 12 Cal. 427.

5 Packer vs. Heaton, 9 Cal. 569; see English vs. Johnson, 17 Cal. 108.

6 Act of Congress Feb. 11, 1875; *ante*, p. 17.

7 Atkins vs. Hendree, 1 Idaho 108; Chapman vs. Toy Long, 4 Sawyer, 35.

8 Leet vs. John Dare S. M. Co., 6 Nev. 218.

9 Act of Congress Jan. 22, 1880, § 2; *ante*, p. 17. § 2324 Rev. Stat. Amendment in brackets, at foot of the section.

10 PATTERSON, J. in U. S. vs. Heth, 3 Cranch, 399, 413; Williamson vs. N. J. S. R. Co., 29 N. J. Eq. 311; Martindale vs. Warner, 15 Pa. St. 471; Starr vs. Pease, 8 Conn. 541; Marsh vs. Chestnut, 14 Ill. 223; Abington vs. Duxbury, 105 Mass. 287; Lucas vs. Tucker, 17 Ind. 41; Knowlton vs. Redenbaugh, 40 Iowa, 114; Davis vs. Administrators, 30 Md. 508; United States vs. Arredondo, 6 Pet. 691; Orr vs. Rhine, 45 Tex., 345; Rogers vs. Greenbush, 58 Me. 395; Le Bois vs. Bramell, 4 How. 449; Wade on Retroactive Laws, § 34, *et seq.* and cases cited.

11 Amendments, Art. 5.

12 Stark vs. Storrs, 6 Wall. 402; Lessieur vs. Price, 12 How. 74; Gibson vs. Chouteau, 13 Wall. 72.

§ 30. Forfeiture.—The circumstances under which mining claims are forfeited are somewhat different from those that ordinarily produce the same result, where pro-

prietary rights secured by contract are subject to conditions. Where the forfeiture arises from breach of contract, and the forfeiture is the penalty fixed for the breach, the ordinary rules will apply.[1] But the forfeiture considered here is for failure to perform annual labor or make improvements as provided in the statute, or by local rules.[2] The failure to perform labor as required leaves the claim open to relocation, subject to the proviso, that at any time before it is so relocated the original locators, their heirs, assigns or legal representatives may preserve their rights by resuming work. The rules of decision adopted with reference to forfeiture for failure to perform assessment work under the district rules will apply. It was held under these rules that there could be no forfeiture unless the rule requiring the labor provided for forfeiture.[3] For the reason that forfeitures are considered odious in law, the statute will be strictly construed against them.[4] The question can only arise between the party from whom the labor was due and some one who has availed himself of the default by relocating the claim before work is resumed. Until this is done no one is in a position to contest the right of the original locator.[5] It has been decided in a case at Nisi Prius that after a party had entered for the purpose of relocation after forfeiture, and before he had completed sufficient work to locate the claim, the original locators resumed work, the forfeiture was saved.[6] On the other hand, it was decided in another case that the party attempting to take up *abandoned* property had the same period to complete his relocation as the original locator had.[7] As these cases are reported there is no necessary conflict in the decisions. In the one case it was *forfeiture*, and in the other *abandonment*. There is a vast difference between the two. The question of *intent* does not enter into the question of forfeiture.[8] It is the *loss of a right* previously acquired, by failure to perform

work or make improvements, which is a condition subsequent to the enjoyment of the right.[9] In setting up forfeiture of another's rights, as the foundation of adverse rights, it is incumbent upon the pleader to plead the forfeiture specially and state the facts constituting the forfeiture,[10] and the burden of proof will be upon him to show affirmatively that the necessary work was not done.[11]

1 McKnight vs. Kreutz, 51 Pa. St. 232; *s. c.*, 53 Pa. St. 319; Von Schmidt vs. Huntington, 1 Cal. 70; Wiseman vs. McNulty, 25 Cal. 230.

2 Rev. Stat. U. S., § 2324; *ante*, p. 15.

3 Bell vs. Bed Rock Co., 36 Cal. 214; McGarrity vs. Byington, 12 Cal. 427. But see King vs. Edwards, 1 Mont. 235.

4 Coleman vs. Clements, 23 Cal. 248.

5 Wiseman vs. McNulty, 25 Cal. 230; Brady vs. Lee, 38 Cal. 362.

6 STONE, J., in Graydon vs. Hood, Morrison's Mining Rights (4th ed.), 65.

7 HALLETT, J., in Little Gunnell Co. vs. Kimber; *id.*

8 Bell vs. Bed Rock Co., 36 Cal. 214: *infra* § 33, where the two are distinguished.

9 St. John vs. Kidd, 26 Call. 263; King vs. Edwards, 1 Mont 235.

10 Morenhaut vs. Wilson, 52 Cal. 263 (overruling Bell vs. Brown, 22 Cal. 671); Dutch Flat W. Co. vs. Mooney, 12 Cal. 534.

11 Oreamuno vs. Uncle Sam G. & S. M. Co., 1 Nev. 215.

§ 31. Relocation of entire claim forfeited.—In relocating claims forfeited for failure to perform annual labor, the same acts are required as in an original location. The language of the statute[1] is: "The claim or mine upon which such failure occurred shall be open to relocation *in the same manner as if no location of the same had ever been made*," etc. It is a question whether the provision that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,"[2] would apply so as to require a new discovery of mineral. Certainly all the acts *of location must be original* with the relocator, as they

were with the original locator.[3] As has already been noticed, the resumption of work at any time prior to the completion of the relocation may rehabilitate the owner of the claim with all the rights lost by his previous failure.[4] And this resumption may take place at any time after the lapse of successive years in which such failure has occurred, with like effect as though the claimant had failed for but a single year, provided the claim was not abandoned.[5]

1 Rev. Stat. U. S., § 2324; *ante*, p. 15.
2 Rev. Stat. U. S., § 2320; *ante*, p. 14.
3 Strong vs. Ryan, 46 Cal. 33.
4 *Ante*, § 30.
5 It has been held in substance that one cannot enter to relocate while the original locator, who has failed to perform the necessary labor is in possession. Bradley vs. Lee, 38 Cal. 362.

§ 32. Relocation of claims forfeited to co-owners.—It has been decided that one of several co-owners of a mine, upon which there has been a failure to perform the amount of labor required by district rules, might treat it as abandoned property and relocate it in the name of himself and others, and thus appropriate the interest of a co-owner who failed to contribute.[1] The authority of this case is questionable even under district rules that did not render the failure to perform labor *ipso facto* an abandonment of the claim. There is no doubt that it would be inapplicable under the law of Congress governing the question of forfeiture and prescribing the method by which it might be taken advantage of by co-owners.[2] That provides that for failure to contribute his proportion of the expenditures, he will be subject to the process which is popularly known as "advertising out." That is by notice served personally or by publication, and the expiration of ninety days after such service is complete, and a continued failure to respond, his interest is divested

and passes to his co-owners who have made the required expenditure.

[1] Strong vs. Ryan, 46 Cal. 36.
[2] Rev. Stat. U. S., § 2324; *ante*, p, 15.

§ 33. **Abandonment.**—This is quite a different matter from *forfeiture*. It is true that the rights of the owner of an unpatented claim may be forfeited by abandonment, or failure to work, may be evidence of abandonment;[1] but forfeiture for failure to work may be either voluntary or involuntary, and may be cured by resuming work at any time before adverse rights are acquired;[2] while abandonment must *always* be voluntary and utterly extinguishes all right as soon as it occurs, leaving the original owner on the same footing, with respect to that claim, as any stranger.[3] Abandonment may take place within the year for which the labor is due, and even after the year's labor is performed.[4] The intention is a mixed question of law and fact. Failure to pay assessments is not conclusive, unless made so by statute or some district rule in force at the time; but if the failure to pay assessments or perform work was in pursuance of an intention to abandon the claim it will suffice to prove abandonment.[5] The statement of the party himself may be introduced in his own behalf as part of the *res gestæ*, to disprove that he had abandoned the claim.[6] Leaving tools upon the ground is also evidence of an intention to return;[7] absence and nonuser for any time short of the statute of limitations, does not show abandonment;[8] but connected with other circumstances may have that tendency;[9] so, a gift of the claim to another, by leaving it with the intention that the donee take possession, which he does, instead of tending to prove abandonment, proves the contrary.[10] Evidence of *an offer to purchase and* a refusal on the part of plain-

tiff to sell, was held as tending to disprove his abandonment of the claim.[11] The judgment roll in a former case, in which plaintiff successfully sued another party for possession, is competent to rebut evidence of prior abandonment.[12] A second location on the same ground is not necessarily an abandonment of the first location.[13] The burden of proof rests with the party relying on an abandonment as a basis of title or right.[14] But it may be shown by defendant, under a denial by defendant of plaintiff's title, without being specially pleaded.[15] In this respect it differs from a forfeiture. By the latter the rights of the locator are not absolutely lost, but only subject to appropriation by another, and must be specially pleaded, while by the former there is nothing further required to divest the rights of a party who has abandoned.[16] Of course the doctrine of abandonment only applies to claims held by possessory right, and not to those where the legal title is vested in the claimant.[17] The *relocation* of abandoned claims is governed by substantially the same rules that govern any original location.[18]

1 Depuy vs. Williams, 26 Cal. 309; Oreamuno vs. Uncle Sam, &c. Co., 1 Nev. 215.

2 *Supra*, § 30.

3 Welll vs. Lucerne M. Co., 11 Nev. 215; St. John vs. Kidd, 26 Cal. 263; Mallett vs. Uncle Sam M. Co., 1 Nev. 194; Waring vs. Crow, 11 Cal. 366; Davis vs. Butler, 6 Cal. 510; Davis vs. Gale, 32 Cal. 26; Morenhaut vs. Wilson, 52 Cal. 263; Lechler vs. Chapman, 12 Nev. 66; Derry vs. Ross, 1 Col. Law Rep. 243. (Sup. Ct. Col., Dec. term 1880.)

4 Merley vs. Ennis, 2 Col. 300.

5 Oreamuno vs. Uncle Sam, &c. Co., 1 Nev. 215; Strong vs. Ryan, 46 Cal. 33; McGarrity vs. Byington, 12 Cal. 431.

6 Noble vs. Sylvester, 42 Vt. 146; but his testimony as to his intention is not conclusive. Meyers vs. Spooner, 55 Cal. 257.

7 Harkness vs. Barton, 39 Iowa, 101; Morenhaut vs. Wilson, *supra*.

8 Davis vs Butler, 6 Cal. 510; Mallett vs. Uncle Sam, &c. M. Co., 1 Nev. 188.

9 Davis vs. Gale, 32 Cal. 26.

10 Richardson vs. McNulty, 24 Cal. 339. (But see Merley vs. Ennis, 2 Col. 300.)

11 Bell vs. Bed Rock Co., 33 Cal. 214.

12 Richardson vs. McNulty, 24 Cal. 339.

13 Weill vs. Lucerne M. Co., 11 Nev., 201.

14 Oreamuno vs. Uncle Sam, &c. Co., *supra.*

15 Bell vs. Bed Rock Co., 36 Cal. 214; Morenhaut vs. Wilson, 52 Cal. 263.

16 Morenhaut vs. Wilson, *supra.* Atkins vs. Hendree, 1 Idaho, 108.

17 Ferris vs. Coover, 10 Cal. 589.

18 Murley vs. Ennis, 2 Col. 300; Golden Fleece Co. vs. Cable Con. Co. 12 Nev. 312.

§ 34. **Surface rights acquired by location.**—It is not understood that any title to the mining property is acquired by location, as against the Government of the United States. The locators have merely a present right of exclusive possession and a preference-right of entry, and purchase.[1] Still these rights, such as they are, are characterized as *vested rights*,[2] and the right to an unpatented claim is not divested by a patent for agricultural land including the mineral claim.[3] His right to the surface within his boundaries is exclusive in its possessory character, and even before the enactment of the statute, by which he was allowed all side veins on the ground located, no one could enter upon his claim for the purpose of prospecting for such supposed veins. They were required to be discovered outside, before they could be followed within the boundaries of the claim regularly located.[4] Since the act of May 10, 1872,[5] the exclusive right to the surface includes the right to possess and enjoy all veins, lodes and ledges throughout their entire depth, etc., which lie inside of such surface lines; and this provision *applies as well to* all prior locations where no ad-

verse claim existed at the date of the passage of the act, as to subsequent locations. Although the claim taken is on a lode, or vein, the locator does not thereby relinquish his exclusive right to any valuable loose quartz or other rock he may find on the surface.[6] The surface rights of the locator under the present law are strictly confined to his boundary lines, and he cannot change these, so as to conflict with other rights, in order to correct any mistakes or oversights as to the true direction of his vein. If he has through mistake located his claim across the vein instead of along it, he cannot make a valid relocation so as to disturb the rights of subsequent locators on the same vein, or whose surface boundaries may include it.[7] But it will be presumed to be on the vein till the contrary appears.[8]

1 Gore vs. McBrayer, 18 Cal. 583.

2 *Post*, Ch. xiii. RIGHTS AND REMEDIES; Derry vs. Ross, 1 Col. Law Rep. 243.

3 Gold Hill Q. M. Co. vs. Ish, 5 Oreg. 104.

4 Atkins vs. Hendree, 1 Idaho, 108.

5 Rev. Stat. U. S. § 2322; *ante*, p. 14.

6 Brown vs. '49 and '56 M. Co., 15 Cal. 153.

7 Golden Fleece Co. vs. Cable Con. Co., 12 Nev. 329; Wolfly vs. Lebanon M. Co., 4 Col. 112.

8 Patterson vs. Hitchcock, 3 Col. 538; see *post*, Ch. xiii. MINERS' RIGHTS AND REMEDIES.

§ 35. **Right to side veins.**—One of the rights guaranteed by the act of Congress,[1] which could not be claimed before by virtue of location, is a right to "all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically," etc. However this provision as it affects "cross veins" may be modified by a subsequent section of the same statute,[2] it still holds good as to side veins, whether discovered above or below the surface. These additional or subsequently discovered veins, if

found outside of the claim, might have been followed through it in any direction, under the old law, or rather old set of local rules. And, for the purpose of asserting this right, the author of the new discovery might enter upon the old location to mark out the boundaries of his claim.

[1] Rev. Stat. § 2322; *ante*, p. 14.
[2] Rev. Stat. U. S., § 2336; *ante*, p. 23.

§ 36. **Right to dip, Apex.**—One of the most important provisions of this section[1] is that which secures the right not only to that part of the vein or lode which lies within the side lines extending downward vertically, but to so much of it as departed from the vertical side lines on the *dip*. This provision has been fruitful of no little contention and expensive litigation. As it affects patented and unpatented claims alike, it qualifies the general doctrine of ownership to the center of the earth, which applies to titles to real estate in general.[2] *Dip*, is simply that departure from a vertical position, which is one of the incidents of almost all veins in their downward course. The apex is simply the top of the lode, or terminal point, where it comes nearest the surface.[3] As applied to vertical veins, these terms present few difficulties in construing the statute. The only one upon which serious doubt has been expressed is whether a subsequent location on the apex would take precedence of a prior discovery and location on the same vein below the apex, so as to allow the later discovery to follow the vein, not only within the side lines of the earlier one down to the point where the vein was first discovered, but below that, and thus appropriate the entire vein. Or whether the first discoverer and locator might follow the dip up, as well as down. There can be no doubt that the location which does not include the

apex of the vein, confers no rights under the statute beyond the side lines, at least with reference to side veins.[4] The doubtful question is whether a subsequent location on the *same* vein, at a point nearer the surface, will deprive the original locator of his right to follow the vein at all below his point of discovery. At present, the tendency seems to be in favor of the right of the first discoverer to follow his vein downward on the dip, though not upward, after a subsequent location has been made on the apex.[5] As applied to "flat" or "horizontal" veins, and lodes which are not recognized as veins, the construction of the statute is beset with greater difficulties. Whether the top or apex of the lode lies within the boundary lines of either of two claims, is a question of fact not easily determined in such cases, as in the case of the *Iron Mine* vs. *Loella Mine*.[6] In that case, the plaintiff had the highest point on the vein; but the evidence was conflicting as to whether this was not raised by subterranean disturbance subsequent to the deposition of the mineral, and as to whether the point claimed as the apex was merely the effect of an upward swell in what was really a lode continuous from side to side of plaintiff's claim. The jury were instructed that if the vein was "continuous as suggested, that is to say, if coming in at one side it passes unbroken to the other, the plaintiff cannot follow it beyond the lines of its location."[7] This was substantially the theory of the defendant, for whom the jury found. There are deposits of mineral in *lodes* which so far depart from the characteristics, of what is known by the term "vein," that the statutory provisions as to dip and apex can never be safely applied, for the simple reason that they have no ascertainable apex, and the dip, if there be any, is merely accidental, and not characteristic of that class of deposits, as it is of *fissure veins*, for which the law was enacted. The right to follow the dip is bounded by the end lines of the claim, which are cross-

wise of the general course of the vein on the surface; and where a claim is located across the vein instead of along it, the side lines will be regarded as the end lines for the purpose of determining the right of the locator to follow the dip.[8]

[1] Rev. Stat. U. S., § 2322, *ante*, p. 14.

[2] Bullion M. Co. vs. Crœsus M. Co., 2 Nev. 169; Iron-Silver M. Co. vs. Cheeseman, 1 Col. Law Rep. 461; Eureka, &c. Co. vs. Richmond M. Co., 4 Sawyer (U. S. Cir. Ct.) 302.

[3] Iron Mine vs. Loella Mine, 1 Col. Law Rep. 16.

[4] Iron Mine vs. Loella Mine, 1 Col. Law Rep. 16-23; Mining Co. vs. Tarbet, 98 U. S. 463.

[5] Iron Mine vs. Loella Mine, 1 Col. Law Rep. 16-23; Van Zandt vs. Argentine M. Co., 1 Col. Law Rep. 524. Opinion by HALLETT, J. But not beyond his side lines, unless the location is on the apex. Mining Co. vs. Tarbet, 98 U. S. 463.

[6] *Supra.*

[7] Opinion by HALLETT J. (U. S. Cir. Ct. Dist. Col.)

[8] Mining Co. vs. Tarbet, 98 U. S. 463.

§ 37. Same—Veins uniting on the dip.—The statute provides that when two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.[1] The language here used is such that there can be little doubt that it refers to veins which unite in their downward course. There is another provision in the same section for cases where veins unite in crossing. This would only occur where one vein so far departs from the vertical as to pass within the side lines of an adjoining claim, in which the vein had less dip. So long as the veins are distinct, and can be separately followed, they cannot be said to unite. The statute is merely intended to prevent confusion.

[1] Rev. Stat. U. S., § 2336, *ante*, p. 23.

§ 37*a*. Right to cross veins.—Section 2322 of the Revised Statutes[1] gives quite extensive privileges to the locator, both with reference to the exclusive enjoyment of the surface *within his boundaries* and the right to all veins or

lodes therein included. But by a subsequent section[2] it has been decided that these rights are materially abridged so far as regards cross veins.[3] This decision has not passed unchallenged, and until the question has been passed upon by the Supreme Court of the United States it can hardly be said to be definitely settled.[4] However, in *Hall* vs. *Equator Mining and Smelting Company*,[5] we have the construction given to the statute by HALLETT, J., of the United States Circuit Court, which, from the acknowledged ability and experience in mining questions of the learned judge, is entitled to great weight. There is at least an apparent conflict between the two sections referred to,[6] and upon the ground, that as between conflicting sections of the same statute, the last in order of arrangement will prevail,[7] it was held that the cross-lode section would govern.[8] In this case the question of priority was definitely settled by the patent, but it was held that the section of the statute last in order of arrangement gave the prior claim only to that portion of the cross lode at the point where the two lodes intersected, to the exclusion of the remainder of such lode lying within the territory of the prior location, thus making the question of *intersectio* apply to the *lodes* or *veins*, and not to the *claims*.

1 *Ante*, p. 14.
2 Rev. Stat. U. S., § 2336, *ante*, p. 24.
3 Morrison's Mining Rights in Col. (3d ed.) 282.
4 See Morrison's Mining Rights in Col. (4th ed.) 94-98.
5 Reported in full, Morrison's Mining Rights (3d ed.) 282.
6 §§ 2322 and 2336, Rev. Stat., *ante*, pp. 14 and 24.
7 In the act of 1872, of which these sections formed parts, was numbered "3" and § 2326 was numbered "14." This order of arrangement referred to, and the only one that control, as one of the repeal provisions (§ 5600, Rev. Sta *ante*, p. 29), declares that no inference of legislative cons is to be drawn from the arrangement in the revision.
8 Citing Bacon's Ab. Stat. D., Davies, 156 N.; Brown v missioners, 27 Pa. St. 37; Smith vs. Moore, 26 Ill. 392, of construction.

CHAPTER IV.

TUNNEL RIGHTS.

SECTION 38—Extent of tunnel claim, length.
39—Conflict with prior claims.
40—Width of tunnel site.
41—Labor and improvements on tunnel location.
42—Abandonment.

§ 38. **Extent of tunnel claim, Length.**—From the language of the statute[1] it is quite plain that the exclusive right to locate claims on the line of the tunnel, extends 3,000 feet from the "face" of the tunnel. This term, face, is defined as synonymous with "breast."[2] The term "breast" is frequently used among miners to signify that portion of the tunnel in which the work is prosecuted—the end opposite to the opening. But "face" is used in the statute to mean that point where the tunnel is commenced or goes under cover.[3] And the length of the tunnel site is 3,000 feet from this point.

1 Rev. Stat. U. S. § 2323, *ante*, p. 15.
2 Morrison's Mining Rights.
3 Copp, 144; Corning Tunnel, &c. Co. vs. Pell, 4 Col. 507; *post*, *Land Office Rules*, 22.

§ 39. **Conflict with prior claims.**—The prior discovery which excludes the rights of the tunnel owners has reference to *lodes* and not to claims; so that the first clause or half of the section would seem to give them the right to locate, possess, and enjoy any newly discovered blind leads, even on claims already located. As this section is numbered "4" in the original act, and the section which gives all side veins within his boundaries to the locator of lode claim,[1] is numbered "3," the conflict between them would, under *the doctrine* that gives preference to the last

section in order,[2] be settled in favor of the section cited above, securing tunnel rights.[3] But it is believed that there is no real conflict between these two sections of the statute. The second clause of the section last in order of arrangement, is somewhat explanatory of the former one, and in so far as it explains, qualifies its operation thus: "And locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel * * * shall be invalid." This refers to the *location* of veins and lodes, and not to the *discovery* of them. Therefore, as the locator of the lode claim located all the unknown side veins within his boundary lines, the tops or apices of which were included when he made his location,[4] no subsequent rights to such lodes or veins could be acquired by running a tunnel to discover or disclose them.

1 Rev. Stat. U. S., § 2322, *ante*, p. 14.
2 *Ante*, § 37.
3 *Ante*, § 38; note, (1)
4 Rev. Stat. U. S., § 2322, *ante* p. 14.

§ 40. **Width of tunnel site.**—When a lode has been cut by the tunnel there is no doubt that it would confer a discoverer's right to locate a claim thereon, with surface boundaries substantially as in case of other lode claims; but until the lode is cut, the tunnel owner can lay claim to no ground beyond the width of the tunnel, so that a claim located on a lode discovered within 3,000 feet of the face of the tunnel, but not within the line of the tunnel as determined by parallel lines conforming to its sides, produced to the prescribed distance beyond the face, would hold good as against the claim under the tunnel location.[1] The right secured by work on the tunnel is merely a right to locate, and before this right can be exercised there must be a prior *discovery*. If the discovery is made without the line of the tunnel, previous to

discovery by the tunnel owners, the first discoverer will have the prior right to locate. The tunnel owners cannot be said to be in possession of a lode on the line of their tunnel until such lode is discovered.[2]

1 Corning Tunnel Co. vs. Pell, 4 Col. 507.
2 *Ibid.*

§ 41. **Labor and improvements on tunnel location.**—By the amendment to Section 2324 of the Revised Statutes,[1] the status of claims discovered in this manner is somewhat improved. By this amendment claims may be developed by tunnels run for that purpose, and when so worked are exempt from the requirement of other labor on the surface, for the purpose of perfecting the location. They are further benefited with respect to the requirement of annual labor, as provided by this same section, in that the money expended and labor performed in the tunnel will apply to the claims located thereon. But this amendatory act[2] is applicable not only to tunnel locations made pursuant to Section 2323 of the Revised Statutes, and applies to them only where the lode has been discovered. It applies to *all* lodes worked in this manner by the owners, though the tunnel may be run from a distance, and the work be done elsewhere than on the lode.[3]

1 *Ante*, p. 15.
2 Act of Congress Feb. 11, 1875, Rev. Stat. U. S., § 2324, *ante*, p. 15.
3 Decision of Commissioners, Mark Twain lode. See English vs. Johnson, 17 Cal. 108.

§ 42. **Abandonment.**—But while the claims discovered and located may be kept alive by the required amount, in value, of labor being performed in the tunnel each year, such labor will not preserve the prior right to undiscovered lodes within 3,000 feet of the face; for the statute makes this right dependent on the *diligent prosecution* of work, and fixes the standard of

diligence by the provision that a failure to prosecute work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel. It as an open question, so far as judicial decisions are required to settle it, whether a resumption of work on the tunnel, after such presumed abandonment, would rehabilitate the tunnel owner with all his lost rights with respect to lodes still undiscovered. From analogy it is reasonable to believe that the courts would so decide, at least as against those who had not commenced work during the period of abandonment.

CHAPTER V.

PLACER CLAIMS.

SECTION 43—Definition of placer.
44—Location of placer claims.
45—Survey.
46—Record.

§ 43. Definition of placer.—What are generally called placers, are deposits of the precious metals, not in place. This term has never been applied to other than gold deposits, and for that reason it receives the restricted definition here. It includes such deposits as are found in earth or sand, in a free state, and may be secured by washing and amalgamation, without *milling*. If it includes deposits of any other or different character, it is because legislation has arbitrarily extended the meaning beyond what was originally intended to be covered by the word. The legislative definition, or rather explanation of the word[1] is, "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or *rock in place*," etc. This has been something

of a stumbling-block to the construction of the statutes on this subject. We have already seen that the courts treat certain deposits as *lodes* which are certainly not *veins*,[2] thereby tacitly excluding them from classification as placers. This might be justified upon the ground that the act of 1872, in so far as it conflicts with, repeals Section 2329, which was enacted in 1870.[3] But it may be safely assumed that the *inclusive* words had no reference to deposits of mineral in rock in place which did not conform to the vein formation. Such deposits were hardly known to exist at the time. The intention was merely to designate a class of claims by their popular name, or what they were "usually called." The superfluous words would probably never have created any confusion but for subsequent extensive discoveries of mineral deposits which were not veins, but were in rock in place, and hence not such as were usually called placers. Placers have been described as "superficial deposits, which occupy the beds of ancient rivers or valleys."[4] Free gold which has been displaced from the rock, and carried by the action of the elements to any distance from its original *situs*, has been considered as indicative of placer ground, and not belonging to a claim located on the ledge from which it was dislodged.[5]

1 Rev. Stat. U. S., § 2329, *ante*, p. 20.
2 *Ante*, § 14.
3 *Ante*, § 37.
4 Moxon vs. Wilkinson, 2 Mont. 421.
5 Brown vs. '49 and '56 M. Co., 15 Cal. 153.

§ 44. **Location of placer claims.**—None of the provisions as to location of lode claims can apply to placers. The details in this respect are almost entirely left to local regulation. The only exception is in respect of the amount of land which may be taken by any one locator, or by an *association of persons*. In this there is a want of har-

mony between contiguous sections of the revision, which may mislead. It is first provided that "no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons."[1] The next succeeding section says: "No such location shall include more than twenty acres for each individual claimant."[2] If there were any real conflict between these sections the latter would govern, for the reason that it was enacted in 1872,[3] while the preceding section was a part of the act of 1870. But there is no such conflict. Construed together, the first section limits the number of acres located in one claim to one hundred and sixty, regardless of the number of persons forming the association, while the latter section definitely limits the number of acres to be located by one person. If an association is formed of eight persons or more, one hundred and sixty acres may be located. If it be composed of less than eight persons, the amount of land which may be located, will be diminished below one hundred and sixty acres, just as many times twenty acres, as the number of persons falls short of eight.

1 Rev. Stat. U. S., § 2329, *ante*, p. 20.
2 Rev. Stat. U. S., § 2331, *ante*, p. 21.
3 Act of Congress May 10, 1872, § 10.

§ 45. **Survey.**—Most of the provisions in regard to survey have direct reference to the application for a patent. But even for purposes of location, where the claim is on the surveyed lands of the United States, it will be sufficient to designate the fractional portion of the section without any survey, and it is doubtful whether any local statute or regulation requiring anything further than this, by way of identifying the claim would be obligatory. When, however, the claim is taken on unsurveyed lands, the survey, or measurement of the ground

and the designation of the particular tract, in such a manner as to identify it, would necessarily be required of the locator.[1]

[1] Rev. Stat. U. S., § 2331, *ante*, p. 21.

§ 46. **Record.**—The recording of a placer claim is purely a matter of local regulation. Where the local law requires a record of them to be made, there is no doubt that the description of such as are on surveyed lands by designating them according to legal subdivisions would be sufficient. Indeed, this would be more definite and certain for all the purposes of a record than a description by reference to monuments, however permanent.

CHAPTER VI.

MILL SITES.

SECTION 47—Possessory rights.
48—Extent of mill site.

§ 47. **Possessory rights.**—Prior to the enactment of the provision of the statute in relation to the location and patenting of mill sites,[1] tracts of land were located for such purposes under local regulations, or held under the law of possession. When claimed independently of any local law or district rule by mere possession, the rights of the claimant were subject to all the restrictions and qualifications which attach to mining claims generally when held by possession upon portions of the public domain. It must be a *pedis possessionis*, a subjugation to the will and control of the claimant, with the evident intention of using a particular portion of the public domain for milling purposes. The declared intention of the claimant to use adjacent land to construct a ditch for the pur-

pose of carrying water to a particular point, was held no notice of a claim to the land near the end of the ditch as a mill site.[2] The same duties as to marking boundaries, diligent prosecution of work, or erecting improvements upon the tract selected, as in case of lode or placer claims, when held by possession, are required in order to hold mill sites on public land.[3]

1 Rev. Stat. U. S., § 2337, *ante*, p. 23.
2 Robinson vs. Imperial S. M. Co., 5 Nev. 44.
3 *Ibid.*

§ 48. **Extent of mill site.**—The provisions of the federal statute are quite meagre in respect to the location of mill sites. The most important provision is as to the amount of ground to be taken for that purpose. This is limited to five acres of non-mineral land. Although this provision is conclusive, all local laws, rules or regulations to the contrary notwithstanding, it does not prevent the local legislatures or mining districts from further restricting claims of this character.

CHAPTER VII.

TIMBER.

§ 49. **Timber reserved to government.**—The right to occupy and possess the public domain for mining purposes does not necessarily include the right of appropriation of growing timber on the land so occupied. Prior to an act authorizing the cutting of such timber, approved June 3, 1878,[1] it was held, under the provisions of a prior statute,[2] in an action between an occupant of mineral lands and one who occupied a portion of the public domain for agricultural purposes, that neither could claim a superior right to the other, to the growing

timber, except upon the ground of priority of possession, for the reason that the cutting of timber by any occupant was expressly prohibited by said statute.[3] On an information for cutting timber on the public land in violation of Section 2461 of the Revised Statutes, filed November 24, 1877, in the District Court of the United States for the district of Oregon, the case was submitted on findings in a special verdict, which were in substance as follows: (1) That defendant did cut and remove the timber between January 1, 1875, and November 1, 1877; (2) that in 1870 defendant claimed the land for the purpose of placer mining, and in August, 1872, caused the claim to be surveyed and platted; (3) that in 1873 all the necessary conditions to obtaining a patent were complied with except paying for the land; (4) that the premises were "placer mining ground," and that it was necessary, to successfully mine the same, to remove the trees standing thereon, and that it was better, for the purposes of such mining, that the timber should be removed so far in advance of the work as to give opportunity for stumps to rot and so be more easily disposed of; (5) that between 1870 and 1877 defendant made improvements on his claim to the amount of $2,500, and worked the ground during the mining season thereafter; (6) that defendant expected to make a business of working the claim; (7) that about one-third of an acre was worked over annually, and the trees cut and removed were taken from about four acres of the same. The court construed the section of the Revised Statutes under which the information was filed, and which was enacted March 2, 1831, in connection with subsequent acts upon the same subject—the mining, homestead and pre-emption laws—and held that in so far as the provisions of the subsequent statutes conflicted with *the act* of prior date, it was repealed. *The timber act* was intended to be modified by the statute

permitting the occupation and enjoyment of public land for mining purposes, in so far as such modification was necessary for the full enjoyment of the right to mine.[4] It was held not to be compulsory upon defendant to apply for a patent and pay for the land; but his failure to do so was taken into consideration to determine whether the location as a mining claim was not a cover for the securing of the timber for speculative purposes. It was admitted that the miner might remove the timber in order to facilitate his mining operations, and that when so removed he might dispose of it as he saw fit; but it was denied that he might remove and sell the timber for acres in advance of his working. To permit such a course under the excuse that the miners wished to give the stumps time to rot, would expose public lands, chiefly valuable for their timber, to be stripped of their trees upon a pretense of mining, and without compensation to the government. It was held that miners, securing claims prior to patent, had no right to the timber growing thereon except for mining purposes, and to such as was necessarily removed in the progress of mining operations. This case, in many respects, will serve as a judicial construction of the timber act, subsequently passed.[5]

1 "An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all citizens of the United States and other persons, *bona fide* residents of the states of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby authorized and permitted to fell and remove, for building, agricultural, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the *United States*, except for mineral entry, in either of said states,

territories or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

"§ 2. That it shall be the duty of the register and the receiver of any local land office, in whose district any mineral land may be situated, to ascertain, from time to time, whether any timber is being cut or used upon any such lands, except for the purpose authorized by this act, within their respective land districts; and, if so, they shall immediately notify the commissioner of the general land office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

"§ 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months." U. S. Stat. vol. 20, p. 88.

2 Act of Congress March 2, 1831

3 Rogers vs. Loggs, 22 Cal. 444.

4 Citing in support, United States vs. Thomas McEntee, 23 Int. Rev. Rec. 368.

5 United States vs. Nelson, 5 Sawyer, 68.

CHAPTER VIII.

EASEMENTS—WATER RIGHTS.

SECTION 50—Local law governs.
51—Water rights.
52—Statute not retroactive.
53—Previous recognition of water rights.
54—How water rights on public domain acquired.
55—Rights acquired by appropriation.
56—How right established, Remedies.
57—Abandonment.

§ 50. Local law governs.—The federal statute delegates to the local legislatures or the mining districts the

right to prescribe rules governing easement, drainage and other means of developing the property.[1] But vested rights secured by priority of possession to the use of water for mining, agricultural, or other purposes, which rights have been previously recognized by custom or the decisions of courts, in the absence of legislation, are preserved and protected by the federal statute.[2] Some of the most important easements are left untouched by the law of Congress—such as the right of way over adjacent ground; the right to use adjoining claims for dumping ground, and the privilege of drainage. But these are regulated by local laws, rules, or customs, with ample jurisdiction in the premises conferred by the sections already cited.[3]

1 Rev. Stat. U. S., § 2338, *ante*, p. 23.

2 Rev. Stat. U. S., § 2339, *ante*, p. 24; Rev. Stat. U. S., § 2340, *ante* p. 24.

3 Rev. Stat. U. S., §§ 2338 and 2339. See *post*, Ch. xiii., MINERS' RIGHTS AND REMEDIES, § 148 *et seq.* *Easements.*

§ 51. **Water rights.**—Owing to the peculiar emergencies arising from a congressional recognition of the right of miners to enter and purchase portions of the public domain as mining property, water rights received special attention as early as the year 1866, by the act of Congress of July 26, since incorporated into the revision. There were already many ditches, mill privileges, etc., which had been taken up and used under the sanction of local rules and customs, without any claim on the part of the owners to the land upon which such ditches were situated, or any claim of title such as would be necessary to the assertion of riparian rights commensurate to the needs of the recognized mill privileges. Subsequent purchase from the United States of the lands previously servient to the customary easement, would, under other provisions of the act of Con-

gress of 1866, entitle the purchasers to a patent from the general government, which, without the saving sections already referred to,[1] would utterly extinguish the rights previously recognized by custom. For "before the title to these lands was acquired from the government of the United States, no occupancy or appropriation of the waters, * * * no state or territorial legislation, or rule of decision established by the state courts in controversies between occupants of the public land, without title from the government, can in any manner qualify, limit, restrict, or affect the operation of the government patent."[2] The title to the public lands, being in the United States, carries with it the same proprietary or other right to the waters flowing over such lands in streams not navigable, as would belong to any other riparian proprietor, and these rights would pass to the patentee unaffected by any adverse rights, however long they may have endured without government recognition.[3] It was for the purpose of saving these vested rights, or recognized privileges, from the destructive operation of the act of Congress under which the lands servient to the easement were thrown open to exploration and purchase, that this section of the statute was enacted.[4]

[1] *Supra*, § 50.

[2] Union M. & M. Co. vs. Ferris, 2 Sawyer, 176-9; Union M. & M. Co. vs. Danberg, 2 Sawyer, 450.

[3] *Ibid.* Vansickle vs. Haines, 7 Nev. 249; Gibson vs. Chouteau, 13 Wall. 92. See, also, Irvine vs. Marshall, 20 How. 561; Jourdan vs. Barrett, 4 How. 185; Bagnell vs. Broderick, 13 Pet. 450; United States vs. Hughes, 11 How. 568; Gardner vs. Village of Newburgh, 2 Johns. Ch. 166; Elliott vs. Fitchburg R. Co., 10 Cush. 193; Davis vs. Fuller, 12 Vt. 190.

[4] § 2339, *supra*, § 50.

§ 52. Statute not retroactive.—Under the rule of construction hereinbefore adverted to, that statutes will be *construed as prospective*, unless they are incapable of sen-

sible interpretation otherwise than as *retrospective* in their operation,[1] it has been held that this act will not affect the rights of prior patentees.[2] It only tends to confirm rights already acquired, and no right to divert a stream could be acquired by virtue of a local statute, rule or custom, as against one owning the fee, without his consent, express or implied.[3] So, when a patent was issued, in 1864, for land through which the natural channel of a stream lay, and the water had previously been diverted at a point above, it was held that the party so diverting the stream acquired no right either as against the United States or the patentee prior to the patent, for the reasons that the diversion was a trespass upon the riparian rights of the government, and the patentee succeeded by purchase to all such rights as the government had.[4] The provision is only intended as an acquiescence by the government in such easements as may affect unpatented lands.

1 *Ante*, § 29.
2 Union M. & M. Co. v. Ferris, 2 Sawyer, 176–85.
3 Tyler vs. Wilkinson, 4 Mason, 379; Pope vs. Kinman, 54 Cal. 3.
4 Vansickle vs. Haines, 7 Nev. 249.

§ 53. **Previous recognition of water rights.**—The rights with respect to running water which had previously grown up in the mining communities, under the sanction of the courts, were not in all respects in harmony with the doctrines of the common law, which are in substance that the riparian proprietor has such a right to have the water continue in its natural course across his land, that it may not be *unreasonably* appropriated or diverted by another riparian proprietor; and when diverted by one for his own use, he is under some obligation to the proprietors lower down the stream to return the water to its natural channel.[1] In determining the conflicting rights of rival claimants to running water on the public domain,

the courts seem to have left out of consideration entirely the paramount right of the general government, and for the reason that neither of the parties litigant could claim a higher right than such as could be acquired by use and occupation of public land, held that he who first appropriated the waters of a running stream to a useful purpose had a better right than any subsequent appropriator below or above, and might conduct it whithersoever he pleased, without any obligation to restore it to its natural channel, or to preserve its purity or quantity.[2] But this right was only allowed to extend to the quantity already appropriated; so that the rights of a subsequent appropriator of the surplus, or residuum, became equally indefeasable, as against prior and subsequent appropriators. The former could not trench upon his privileges by extending their use of the water to his prejudice.[3] And it was held that any such appropriator, having only a right to use the water, and not a title that would warrant him in appropriating it exclusively, regardless of its use, was bound to make a reasonable use of it, and could claim no more than he could reasonably use for beneficial purposes.[4] But this does not seem to prevent a change either in the use to which the water was applied at the time of the original appropriation, or a change in the place from which it is taken.[5]

1 Tyler vs. Wilkinson, 4 Mason, 379; Atchison vs. Peterson, 20 Wall. 507; 3 Kent Com. 439.

2 Kidd vs. Laird, 15 Cal. 161; Weaver vs. Eureka Lake Co., 15 Cal. 271; Lobdell vs. Simpson, 2 Nev. 272; Ophir S. M. Co. vs. Carpenter, 4 Nev. 534; Dalton vs. Bowker, 8 Nev. 190; Barnes vs. Lobron, 10 Nev. 217; Irwin vs. Phillips, 5 Cal. 140; Butte Canal, &c. Co. vs. Vaughn, 11 Cal. 143; Atchison vs. Peterson, 20 Wall. 507.

3 Proctor vs. Jennings, 6 Nev. 83; Ortman vs. Dixon, 13 Cal. 33; Hill vs. Smith, 27 Cal. 483; Barnes vs. Labron, 10 Nev. 217. But a subsequent appropriator of waste or surplus water used by prior appropriators *may be deprived of* it at any time by diversion, pro-

vided it has not been returned to the original channel without intention to recapture it. Woolman vs. Garringer, 1 Mont. 535.

4 Barnes vs. Labron, *supra;* Munroe vs. Ivie, 2 Utah, 535. The measure of a water right was held to be the quantity a ditch would convey from the point of diversion without overflow. Caruthers vs. Pemberton, 1 Mont. 111.

5 Woolman vs. Garringer, 1 Mont. 535; Maeris vs. Bicknell, 7 Cal. 261; Davis vs. Gale, 32 Cal. 26.

§ 54. How water rights on public domain acquired. —The manner in which these peculiar privileges may be acquired, so that they will be recognized pursuant to the federal statute is (1) by appropriation, (2) by purchase from a prior appropriator. Appropriation evidently means something more than a claim evidenced by notice posted at the point where the water is claimed. It has even been decided judicially that a territorial legislature had no right to authorize any person, or association of persons, to take possession of the running waters on public lands to the exclusion of others, for anything else than beneficial purposes. It could not be so taken and wasted until such time as a purchaser could be found for the privilege.[1] So that a *beneficial purpose* does not mean purposes of speculation. It would probably be safe to say, that a claim to water which could not be applied to any purpose beneficial to the claimant, would be void. The water should be intended for use upon premises owned or occupied by the appropriator. In Montana it is held that water rights are only transferable by deed, as real estate; but that where there was an imperfect, or defective transfer and delivery of possession, it would amount to an abandonment by the grantor and a re-appropriation by the grantee, without interregnum in the so that by the re-appropriation the new occupant thed with all the rights of priority which his in-*ntor had.*[2] It is also held that these rights

may be divested by adverse possession under the statute of limitations.[3]

1 Munroe vs. Ivie, 2 Utah 535; see Atchison vs. Peterson, 20 Wall. 507; Hill vs. Smith, 27 Cal. 483.

2 Barkly vs. Tieleke, 2 Mont. 59.

3 Union Water Co. vs. Crory, 25 Cal. 509; Woolman vs. Garringer, 1 Mont. 535, 544.

§ 55. **Rights acquired by appropriation.**—We have seen that the usufruct is all the right to running waters acquired by appropriation, and that so long as it serves the purpose of its appropriator, and the quantity taken remains undiminished, the original appropriator will have no reason to complain of those who may subsequently divert the water above or below on the same stream.[1] But where the water has been diverted into a private ditch for particular purposes, as irrigation, watering stock, or for domestic use, the owner of the ditch has a right as against a subsequent appropriator, to have the water flow in his ditch unaffected by impurities that would render it unfit for the uses to which it was originally applied, or to which it was applied prior to the later appropriation.[2]

1 *Supra*, § 53.

2 Crane vs. Winsor, 2 Utah, 248; Atchison vs. Peterson, 1 Mont. 561; *s. c.*, 20 Wall. 507; Sims vs. Smith, 7 Cal. 148; Butte Canal, &c. Co. vs. Vaughn, 11 Cal. 143.

§ 56. **How right established—Remedies.**—The law recognizing water rights[1] does not attempt to define them or control the manner of their acquisition. But when they are shown to exist, preserves them inviolate.[2] Such rights may be established by proof of a local custom, by the authority of an act of the local legislature, or the decisions of courts. The union of the three conditions is unnecessary in any particular case, to the perfection of the right claimed by priority. But in case of

a conflict between claims under a local custom and a statutory regulation, the latter will control.[3] In a proper case the infringement of a right to flowing water or other easement obtained by prior appropriation, will be restrained by injunction.[4] But injunction will not issue except in a very strong case, especially where the injuries resulting therefrom will be greater than those relieved against.[5] The prior appropriator of a water right may recover damages from one subsequently appropriating the waters of the same stream for injuries to his right.[6] But consequential injuries resulting from the reasonable use of the right are generally *damnum absque injuria*.[7] Where several contribute to the injury, so that the damage done by each cannot be apportioned, the injured party will not necessarily be remediless.[8]

1 Rev. Stat. U. S., § 2339, *ante*, p. 24.

2 Wixon vs. Bear River, &c. Co., 24 Cal. 367.

3 Basey vs. Gallagher, 20 Wall. 670; Thorp vs. Freed, 1 Mont. 652.

4 *Ibid;* Fabian vs. Collins, 3 Mont. 215; Barkly vs. Tieleke, 2 Mont. 59; Crane vs. Winsor, 2 Utah, 248; Gregory vs. Nelson, 41 Cal. 278; Rupley vs. Welch, 23 Cal. 452; Bliss vs. Kingdom, 46 Cal. 651.

5 Atchison vs. Peterson, 1 Mont. 561.

6 Sims vs. Smith, 7 Cal. 148; Hill vs. Smith, 27 Cal. 475.

7 Edmonds vs. Chew, 15 Cal. 137.

8 Hill vs. Smith, 32 Cal. 166. Suggestions of SAWYER, J.

§ 57. **Abandonment.**—Water rights acquired by appropriation may be lost by abandonment, and such abandonment is purely a question of intention.[1] Merely allowing the water to flow back into the natural channel in order to conduct it elsewhere, is no abandonment of the claim to its use. But he must not retake more than his own. And the burden of proof is on him.[2]

1 Atchison vs. Peterson, *supra*, § 55; Dougherty vs. Creary, 30 Cal. 290.

2 Butte Canal, &c. Co. vs. Vaughn, 11 Cal. 143; Dougherty vs. Creary, *supra*.

CHAPTER IX.

COAL LANDS.

SECTION 58—The statute.
59—Patent of reserved lands.
60—Construction by general land office.

§ 58. The statute.—The "act to provide for the sale of the lands of the United States containing coal,"[1] whether from the clearness of its provisions, or the lack of interest manifested by prospectors and capitalists in mineral deposits of this character, in the mining districts to which its provisions are peculiarly applicable, has received but meager judicial construction. Its provisions as to extent and manner of entry more nearly accord with the laws and regulations governing the exploration and purchase of placer claims, as to the quantity of land and the manner of setting it apart. But the land taken for deposits of coal *must* be from that portion of the public domain which has been surveyed, *must* be by legal subdivisions, and must *not* be taken so as to include deposits of gold, silver or copper.[2]

[1] *Ante*, p. 26.
[2] *Ante*, p. 28, § 6 of the act.

§ 59. Patent of reserved lands.—Mineral lands being reserved from entry and purchase for other than purposes of mining for the mineral deposits, if entered, and a patent secured as coal lands, the patent would be subject to cancellation at the suit of the United States as a patent of reserved lands.[1]

[1] United States vs. Stone, 2 Wall. 525.

§ 60. Construction by general land office.—The *general land office* has found it necessary in construing

this act, to decide that public coal lands could not be entered for patent under the "Timber Culture Act," and that patents so obtained would be canceled.[1] Also, that all lands of the general government, containing coal of any kind, were subject to entry, under the provisions of the statute.[2]

1 5 Landowner, 166, *post*, § 136.
2 Sickel's Min. Laws, 337. *post*, § 136.

CHAPTER X.

HOMESTEADS AND TOWN SITES IN MINERAL DISTRICTS.

SECTION 61—Homesteads.
62—Town sites.

§ 61. **Homesteads.**—In all cases public lands valuable for minerals are reserved from sale, except as otherwise expressly directed by law.[1] This provision of the statute excludes such lands from homestead entry, the sections of the Revised Statutes *expressly* providing for the manner of appropriation and purchase of mineral lands on the public domain, to the exclusion of all others.

1 Rev. Stat. U. S. § 2318, Act of Congress July 4, 1866, Ch. 166, § 5, *ante*, p. 13.

§ 62. **Town sites.**—Title xxxii, Chapter 8, of the Revised Statutes contain the following for the *reservation and sale of town sites on the public lands:*

§ 2380. *Town sites to be reserved.*—The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. (Act of Congress March 3, 1863, Ch. 80, § 1, v. 12, p. 754.)

§ 2381. *Reservations to be surveyed into lots.*—When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land office in the district in which the reservation may be situated, in accordance with the instructions of the commissioner of the general land office. (Act of Congress March 3, 1863, Ch. 80, § 2, v. 12, p. 754.)

§ 2382. *Town or city sites in public lands.*—In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the general land office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the *general land office, it* may be lawful for the President to

cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale. (Act of Congress July 1, 1864, Ch. 205, § 2, v. 13, p. 343.)

§ 2383. *When towns established upon unsurveyed lands, extension limits, how adjusted.*—When such cities or towns are established, upon unsurveyed lands, it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases. (Act of Congress July 1, 1864, Ch. 205, § 3, v. 13, p. 344.)

§ 2384. *When transcript maps of town are not filed in twelve months, proceedings by Secretary of the Interior.*—If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the general land office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot. (Act of Congress July 1, 1864, Ch. 205, § 4, v. 13, p. 344.)

§ 2385. *Where size of lots or town plat vary from general rule.*—In the case of any city or town, in which the lots

may be variant as to size from the limitation fixed in section twenty-three hundred and eighty-two, and in which the lots and buildings, as municipal improvements, cover an area greater than six hundred and forty acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town, which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the Secretary of the Interior may by rule establish. (Act of Congress March 3, 1865, Ch. 107, § 2. v. 13, p. 530.)

§ 2386. *Title to lots subject to mineral rights.*—Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States. (Act of Congress March 3, 1865, Ch. 107, § 2, v. 13, p. 530.)

§ 2387. *Entry of town authorities in trust for occupants.*—Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such a town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541.)

§ 2388. *Entry under preceding section, when to be made.*—*The entry of the land provided for in the preceding*

section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any territory in which a land office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying district in which the lands are situated, who shall transmit the same to the general land office. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541.)

§ 2389. *Entry in proportion to number of inhabitants.*—If, upon surveyed lands, the entry shall, in its exterior limit, be made in conformity to the legal sub-divisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541.)

§ 2390. *Authorities of Salt Lake City, rights of, as to entry.*—The words "not exceeding five thousand in all," in the preceding section, shall not apply to Salt Lake City, in the territory of Utah; but such section shall be so construed in its application to that city that lands may be entered for the full number of inhabitants contained therein, not exceeding fifteen thousand; and as that city covers school section number thirty-six, in township number one north, of range number one west, the same may be embraced in such entry, and indemnity shall be given therefor, when a grant is made by Congress of sections sixteen and thirty-six, in the territory of Utah, for school purposes. (Act of Congress July 1, *Ch. 193*, v. 16, p. 183.)

§ 2391. *Certain acts of trustees to be void.*—Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541.)

§ 2392. *No title acquired to gold mines, etc., or to mining claims, etc.*—No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541; June 8, 1868, Ch. 53, v. 15, p. 67.)

§ 2393. *Military or other reservations, etc.*—The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the crown of Spain, or otherwise. (Act of Congress March 2, 1867, Ch. 177, v. 14, p. 541.)

§ 2394. *Inhabitants of towns on public lands, right of, to enter.*—The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine; and in addition to the minimum price of the lands embracing any town site so entered, there shall be paid by the parties availing themselves of such provisions, all costs of surveying and platting any such town site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect to proceed under other laws relative to town sites in this chapter set forth. (Act of Congress June 8, 1868, Ch. 53, v. 15, p. 67.)

CHAPTER XI.

PATENT.

SECTION 63—Nature and effect of patent.
64—When patent void.
65—Relief, when obtained by fraud.
66—Same—Estoppel by deed.
67—When patent takes effect.
68—What passes by patent.
69—To whom may issue.
70—Reservation in grant of public land.
71—Patent to mining claim.
72—What conveyed by.
73—Land office regulations—Application.
74—Adverse claims.

§ 63. Nature and effect of patent.—As a patent to a portion of the public domain, which is known as a mining claim, clothes the patentee with the same kind of title as that granted by any other patent, it may be serviceable, before going into that branch of the subject relating exclusively to mineral patents, to take a brief review of the authorities as to land patents in general. The United States, being the owner of the public domain in the fullest possible sense, it may part with the title by any species of gift or grant, and may adopt any method of evidencing the irrevocability of the conveyance. This is one of the methods. It has been said by the highest judicial authority that "the whole legislation of the federal government, in reference to the public lands, declare the patent the superior and conclusive evidence of legal title."[1] No right can be acquired by pre-emption, or possession under license of the government, which will serve to divest the title of the government or impeach the title of its grantee.[2] The statute of limitations will not run in favor of one in possession prior to the issue of a

patent as against a subsequent patentee.[3] No one can maintain an equitable right to any portion of the public land as against the patentee which would not be good against the government.[4] And a license from the government cannot be implied from mere forbearance towards one in possession, whether he be asserting a right of possession or not.[5]

1 Bagnell vs. Broderick, 13 Pet. 450.

2 Yosemite Valley Case, 15 Wall. 77.

3 Wilcox vs. Jackson, 13 Pet. 516; Irwin vs. Marshall, 20 How. 558; Fenn vs. Holme, 21 How. 481; Lindsey vs. Miller, 6 Pet. 672; Gibson vs. Chouteau, 13 Wall. 72.

4 Boggs vs. Merced M. Co., 14 Cal. 279.

5 *Ibid.* Fremont vs. Seals, 18 Cal. 433; Ah He vs. Crippen, 19 Cal. 491.

§ 64. **When patent void.**—And yet the mere *issue* of a patent does not in every instance divest the title of the United States. In order to have this effect it is as essential that there should be a grantee who accepts the patent, as it would be in case of a private grant. Therefore a patent which has not been delivered may be withdrawn by the Secretary of the Interior.[1] At common law, if, when the patent is issued, the applicant is not alive, the title does not pass, and the patent is a nullity, for the same reasons that a conveyance to a deceased person would be inoperative.[2] Grants, whether private or public, to deceased persons are as ineffectual as though made to a fictitious grantee.[3] This result is only avoided by the following statutory provision, which is a wise precaution, rendered expedient by the lapse of time which necessarily intervenes between the application for a patent and its issue: " * * * In all cases where patents have been, or may hereafter be, issued, in pursuance of any law of the United States, to a person who has died or who shall hereafter *die before* the date of such patent, the title to *the land designated* therein shall inure to, and become

vested in, the heirs, devisees and assigns of such deceased patentee, as if the patent had issued to such deceased person during life."[4] This statute leaves the title to pass as though it had been fully vested in the patentee during life.[5] A patent issued by the executive department of the general government to land which has, by act of Congress, been reserved from sale, is void, and may be canceled at the suit of the United States.[6] But the fact that the patent is issued to one person on a location and survey made in the name of another does not affect the validity of the grant.[7] All presumptions are in favor of the hypothesis that the officers of the executive department of the United States properly performed their duties in issuing the patent, and so it cannot be collaterally attacked and declared void. It requires a direct proceeding for that purpose.[8] But this rule does not seem to prevent an attack upon a patent issued by the state to a portion of the public land without authority of law, in an action between the state's patentee and one who has become equitably entitled to the land by compliance with the laws of the United States.[9] And it has been decided that a patent which was obtained pending adverse proceedings on a mining application was void as having been issued without authority.[10]

1 Maguire vs. Taylor, 8 Wall. 650.

2 Galt vs. Galloway, 4 Pet. 345; McDonald vs. Smalley, 6 Pet. 261; Galloway vs. Finley, 12 Pet. 298; McCracken's Heirs vs. Beale, 3 A. K. Marsh. 210; Thomas vs. Wyatt, 25 Mo. 26.

3 Davenport vs. Lamb, 13 Wall. 418.

4 Act of Congress, May 20, 1836.

5 Lessee of French vs. Spencer, 21 How. 228.

6 United States vs. Stone, 2 Wall. 525.

7 Brown vs. Huger, 21 How. 305.

8 Collins vs. Bartlett, 44 Cal. 371; Miller vs. Dale, 44 Cal. 562. But when void on its face may be collaterally attacked; St. Louis Smelting, &c. Co. vs. Kemp; *infra*, § 65, note 6.

9 *Rosecrans* vs. Douglas, 52 Cal. 213.

10 *Rose* vs. *Richmond* M. Co., 2 Col. Law Rep. 7.

§ 65. **Relief, where obtained by fraud.**—It is the settled doctrine of the Supreme Court of the United States, in which respect it is followed by all other courts of general equity jurisdiction, that when a patent has been obtained by fraud practiced upon the officers of the government, equity will relieve parties who have a legal right or title to the property.[1] But in an action of ejectment, fraud in the survey of the premises or procurement of the patent, cannot be collaterally set up by one who has no equities which he could assert against the government.[2] If the right asserted adversely to the patent title is claimed by one on the ground of prior possession and improvement, with the knowledge and acquiescence of the applicant for patent, so as to operate as an estoppel *in pais* to divest the title after patent obtained, it must appear (1) that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title at the time of the active or passive acquiescence;[3] (2) that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud;[4] (3) that the party setting up the estoppel was himself not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and (4) that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.[5] The relief which a court will grant is not always by avoiding the patent, even when obtained by fraud. If it be issued to the wrong person, or the one not equitably entitled to receive it, the proper and most efficacious remedy is by judicial transfer of the title.[6]

[1] Lytle vs. Arkansas, 9 How. 328; Bernard vs. Ashley, 18 How. 44; Garland vs. Wynn, 20 How. 6; Johnson vs. Towsley, 13 Wall. 72.

[2] Gaines vs. Nicholson, 9 How. 364; Jackson vs. Lawton, 10

Johns. 24; Field vs. Sebury, 19 How. 332; Moore vs. Wilkinson, 13 Cal. 478; Boggs vs. Merced M. Co., 14 Cal. 279.

3 Whitaker vs. Williams, 20 Conn. 104; Boggs vs. Merced M. Co., 14 Cal. 279; Delaplaine vs. Hitchcock, 6 Hill (N. Y.) 16.

4 Commonwealth vs. Maltz, 10 Barr (Pa.) 531; Copeland vs. Copeland, 28 Me. 539; Brewer vs. Boston, &c. R. Co., 5 Metc. 479; Boggs vs. Merced M. Co., 14 Cal. 279.

5 Boggs vs. Merced M. Co., 14 Cal. 279; Moye vs. Yappen, 23 Cal. 306; Kelley vs. Taylor, 23 Cal. 11; Maine Boys' T. Co. vs. Boston T. Co., 37 Cal. 40.

6 Silver vs. Ladd, 7 Wall. 219. In a very recent case—an action at law for the recovery of possession of a portion of a patented placer claim—the following points were made for reversal of judgment in favor of defendants: (1) Error in admitting the record of proceedings in the land office to impeach the validity of the patent. (2) Error in instructing the jury that a patent for a placer claim, since the Act of 1870, could not embrace in any case more than one hundred and sixty acres. (3) Error in instructing the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent; and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers to allow such application and to issue a patent thereon. These objections were held well taken, judgment was reversed and the cause remanded. The grounds of the decision, as stated in the opinion, are that the lands conveyed, being admitted to be portions of the public domain not reserved from sale, the land department had undoubted jurisdiction to determine all questions of compliance with the law, so as to decide judicially whether the applicant was entitled to the patent applied for. The patent being regular on its face, it could only be impeached by a direct proceeding for that purpose in the name of the United States, or in the name of a party aggrieved by the granting of the patent, and who could connect himself with the original source of title, so as to show that his rights were injuriously affected by the existence of the patent. Such proceeding must be in a court of equity. In the course of the opinion a distinction is made between the terms "location" and "claim," as used in the statute with reference to the quantity of ground that may be included in one "location," holding that a patentable "claim" may include several contiguous locations, regardless of the number of acres. As to the conclusiveness of the patent as evidence in a collateral proceeding, of the regularity of its issue, the case of Minter vs. Crommelin (18

Towsley, 13 Wall. 85; Stark vs. Starr, 6 Wall. 402; Silver vs. Ladd, 7 Wall. 228.) Several other questions of importance in mining litigation were decided, which, on account of the lateness of the decision it may prove impracticable to properly notice. *Rose vs. Richmond Min. Co.*, Sup. Ct. Nev., March 16, 1882. Opinion by HAWLEY, J.

§ 66. **Same—Estoppel by deed.**—Where, previous to obtaining his patent, the patentee has executed a deed of warranty, or one containing covenants that he is seized of an estate in the land, he is estopped by his deed from setting up his subsequently acquired title against his grantee. Neither he, nor those claiming in privity with him, will be permitted to allege and prove by the subsequent patent that he was not so seized at the time of making the prior conveyance.[1] But a covenant binding upon heirs, by grantors in possession, and asserting only a possessory title, having applied for a patent, that if they obtained the fee simple title to the property "from the government of the United States, they will convey the same" to the grantee, his heirs, etc., "by deed of general warranty," was held to be a special and limited covenant, to take effect only in case the grantors or their heirs acquired title directly from the United States as contemplated when the covenant was entered into.[2] In other words, that a title purchased from another patentee would not inure to the benefit of the special covenantee. And in the same case it was held that a warranty against the adverse right or title of any one, saving and excepting the United States, would not prevent the warrantor from subsequently acquiring the government title for himself.[3] The latter proposition, however, would not apply where the deed contained covenants of seizin of an estate in the land conveyed, with which the patent title subsequently acquired would be inconsistent, as the deed would estop the covenantor from asserting title under the patent, particularly

where the patent was applied for at the time of the conveyance, for reasons that will appear in the next section.

1 Landes vs. Brant, 10 How. 374; Van Renssalaer vs. Kearney, 11 How. 325; Lessee of French vs. Spencer, 21 How. 228.

2 Comstock vs. Smith, 13 Pick. 116; Davenport vs. Lamb, 13 Wall 418.

3 Davenport vs. Lamb, *supra*.

§ 67. When Patent takes effect.—When a patent has been regularly applied for, and the government price paid for the land, the purchaser has a *vested right* to the government title, which, as between him and the government, or any one claiming under it, is equivalent to the patent itself, and will, by relation back to the time when the application for patent was complete, cut off all intervening rights or claims to the granted premises.[1] This taking effect by relation would operate as another obstacle to the assertion of any rights under the patent, as against the grantee of the patentee, in a case where the land was conveyed by the applicant pending the application. But while it is admitted that, so far as it is necessary to protect the rights of the patentee or those claiming under him, the patent will take effect by relation to the time he was entitled to it under the law, it is maintained that this doctrine is a mere fiction of law adopted by the courts, solely for purposes of justice, and is only applied for the security and protection of the person who instituted proceedings for the patent title, or some one who occupies a position in privity with him, who has acquired an equitable claim or right to the title.[2] Therefore, this doctrine of relation cannot be invoked by one who claims under the statute of limitations, adversely to the patentee, to give character to his possession between the time when the patentee became equitably entitled to the *patent*, and the date of its issue, so

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as to free such adverse possession from the objection that the statute of limitations would not run against the government.[3] Nor does the doctrine of relation take effect, so as to cut off the rights of an earlier patentee of a mining claim under a junior location.[4]

1 Stark vs. Starrs, 6 Wall. 402; Lessieur vs. Price, 12 How. 59; Gibson vs. Chouteau, 13 Wall. 72.

2 Lynch vs. Bernal, 9 Wall. 315; Jackson vs. Bard, 4 Johns. 230; Heath vs. Ross, 12 Johns. 140; Gibson vs. Chouteau, 13 Wall. 72.

3 Wilcox vs. Jackson, 13 Pet. 516; Irwin vs. Marshall, 20 How. 558; Fenn vs. Holme, 21 How. 481; Lindsey vs. Miller, 6 Pet. 672; Gibson vs. Chouteau, 13 Wall. 72.

4 Eureka, &c. Co. vs. Richmond, &c. Co., 4 Sawyer, 302.

§ 68. **What passes by patent.**—When a patent to a portion of the public domain is regularly and lawfully issued, it clothes the patentee with an indefeasible title to the land, and all fixtures and appurtenances that ordinarily pass by a grant of real estate, which are not reserved, either by act of Congress or by a special exception in the patent itself.[1] In the cases cited, the question was raised with respect to a grant of land containing minerals, but which was not claimed and entered by the patentee, under the mining law, whether the precious metals contained therein passed to the patentee. In support of the negative, the old English doctrine of the royal right to mine for the precious metals was invoked and claimed for the state, as a necessary incident of its sovereignty, by analogy to the claim of exclusive rights of the same nature conceded to the British crown, as well as on the authority of an earlier state decision.[2] But this doctrine was held by BURNETT, J., in a separate opinion,[3] and by FIELD, C. J.,[4] to be inapplicable. The royal right contended for is not based upon the ground that it is an "incident of sovereignty," but a personal prerogative of the king which he could alienate at pleasure. It was

therefore held that the general government owned the public domain, situated within the boundaries of a state, precisely as any other proprietor, except that it was not subject to taxation.[5] So where the general government grants to a railroad company a right of way through mineral lands, without reservation, no exception will be implied, for the mere reason that mineral lands have been reserved from the alternate sections donated to the same company.[6]

1 Moore vs. Smaw, and Freemont vs. Flower, 17 Cal. 199; Boggs vs. Merced M. Co., 14 Cal. 279.
2 Hicks vs. Bell, 3 Col. 219.
3 Boggs vs. Merced M. Co., 14 Cal. 279.
4 *Ibid;* Moore vs. Smaw, and Freemont vs. Flower, *supra.*
5 *Ibid;* Doran vs. Central, &c. R. Co., 24 Cal. 245.
6 Doran vs. Central, &c. R. Co., *supra.*

§ 69. **To whom may issue.**—The only classes who may become patentees of the government land are (1) persons who are citizens; (2) persons who have declared their intentions to become citizens; (3) associations of persons who belong to either or both of the preceding classes, and (4) corporations organized under the laws of the United States.[1] These are the classes who may acquire title to mining claims on the public domain, by purchase from the United States, and it is unnecessary to inquire what other qualifications are required for other purposes, or to what extent the term "citizen" is qualified in other connections, further than will serve to illustrate the meaning of the word as used in this connection. It has been declared as the opinion of the court, in construing a statute donating certain lands, upon certain conditions, where this word was used, and the individuals qualified to receive the benefits of the act were designated as single and married *men*, that in construing a *benevolent* statute of the government made for

the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, the words "single man" and "married man," especially if aided by the context, were to be taken in their generic sense. It was accordingly held that the terms used would include unmarried *women*.[2] This case is not cited as authority for the purchase of mining claims on the public domain by female citizens. There seems no doubt of their right to acquire the government title. But when the unmarried woman is by birth an alien, and becomes domiciled in this country, after attaining her majority, how is she to become naturalized, or assume the citizenship necessary to qualify her to become the purchaser of land from the government, while she remains single? If the analogy between the two statutes is sufficiently close to admit of the enlargement of the terms of the act of May 2, 1872, so as to include foreign born females, it could only be by dispensing with the declaration of intention.

1 Rev. Stat. U. S. §§ 2319, 2321, 2325, *ante*, pp. 13-14, 17.
2 Silver vs. Ladd, 7 Wall. 219.

§ 70. **Reservations in grants of public land.**—It has already been noticed that the title of the government to its lands will not be divested by a patent to land reserved from sale.[1] Reservations are often inserted in the grant. This is especially true of patents to lands in mineral districts, which are appropriated and purchased for other than mining purposes, as grants to railroad corporations to aid in the construction of their roads, by the clause in the patent excepting mineral lands from the grant, the reservation is as complete as though they were included in a district set apart by act of Congress. The patent conveys no title to the mineral lands included in the granted sections.[2] But such exceptions do

not reserve all lands upon which particles of gold may be found, or which contain veins of mineral bearing rock. It must, at least, be shown that the land contains minerals in sufficient quantities to render it available and valuable for mining purposes.[3]

1 *Supra*, § 64.
2 McLaughlin vs. Powell, 50 Cal. 64.
3 Alford vs. Barnum, 45 Cal. 482.

§ 71. **Patents to mining claims.**—The manner of proceeding to obtain a patent to mining claims is very plainly pointed out, and clearly expressed in the statute,[1] and is somewhat elucidated by decisions of the executive department.[2] Where the claim is taken upon lands, not included in the public surveys, very careful provisions are inserted as to designating the boundaries and quantity of lands. These are required to be inserted in descriptive language in the patent.[3] When in ascertaining the lines, courses and distances are given which conflict with the natural objects designated to fix the boundaries, it is a uniform rule that the latter must prevail. And where an unnavigable river is referred to as a boundary, the grant extends to and follows the course of its channel.[4]

1 Rev. Stat. U. S., § 2325 *et seq.*, *ante*, p. 17.
2 *Post*, §§ 105, 106, *et seq.*
3 Gazzam vs. Phillipps, 20 How. 372.
4 Brown vs. Huger, 21 How. 305. Only in the absence of monuments do courses and distances in the location certificate govern—Pollard vs. Shively, 1 Col. Law Rep. 230. (S. C. Col., Dec. 7, 1880.)

§ 72. **What conveyed by.**—The patentee of mining property, obtains the same title, subject to reservations and exceptions in the law or the patent itself, as pass to patentees generally.[1] But the patentee of a lode claim *obtains something* additional to a complete title to the

ground embraced within his boundary lines. His patent is a confirmation of the right, secured by location, to follow his lode on the dip, where it enters adjoining ground between the parallel end lines of his claim. And this right is what renders essential the provision in the statute that "the end lines of each claim shall be parallel to each other."[2] This provision, however, has been held to be merely directory, so far as it affects the actual survey, but applies by implication to claims located prior to May 10, 1872, with like effect as to those subsequently located, and is equally restrictive upon the rights of patentees, in following their lodes on the dip, whether the actual end lines of their patented ground be parallel or not. In other words, whatever be their divergence from parallel, the patentee in following the dip of his lode will be restricted to vertical planes drawn downward through the ends of his claim, and extended parallel to each other, as the boundaries of his rights.[3]

1 *Supra*, §. 68.
2 Rev. Stat. U. S. § 2320; *ante* p 14.
3 Eureka, &c. Co. vs. Richmond, &c. Co., 4 Sawyer, 302.

§ 73. **Land office regulations — Application.** — The rules prescribed by the general land office with respect to applications for patents to mining claims, the full text of which will be found in another place,[1] are designed to carry out the requirements of the statute. These rules, in so far as they supply methods for effectuating the expressed intention of the legislative body, and do not set up standards of duty which tend to impose burdens by which the rights acquired by those who have complied with the law are defeated, are obligatory. Of course the rules and decisions of the executive department, when go beyond the formal matters connected with the *tion*, are not binding upon the courts as rules of

decision. Where the executive officers are authorized to act judicially in this connection, the Secretary of the Interior is the highest appellate tribunal, and the rules of practice of the department will govern. But where the question involved is a construction of the law which determines the validity of the patent or the person entitled thereto, it must rest with the courts for decision, and be determined independently of executive construction of the law.

[1] *Post*, § 75 *et seq.*

§ 74. **Adverse claims.**—For the most part the questions at issue in the prosecution of suits in support of adverse claims will be found distributed in a subsequent chapter,[1] under proper headings. But there are some preliminary questions—such as, *by whom filed; the effect of failure to file; jurisdiction of courts*—which have been judicially determined, and are proper for notice in this place. The statute itself mentions no one else as authorized to file an adverse claim except the claimant himself; but this omission interposes no obstacle to his acting by an agent, duly authorized and whose authority is properly evidenced. The necessity of this is apparent where the adverse claimant is a corporation, which can only act by an agent. But the mere statement by the person acting in that capacity is not sufficient evidence of his authority to act.[2] There is scarcely room for construction of the plain provisions of the statute[3] as to the effect of a failure to file the adverse claim, and to commence a suit in support thereof; yet it has been decided that such a failure by a prior locator amounted to a waiver of his prior rights.[4] The question of jurisdiction has presented some difficulties. The statute is silent with respect to the courts to which the questions at issue *between the parties shall* be submitted, beyond the pro-

vision that the adverse claimant shall commence proceedings "in a court of competent jurisdiction, to determine the question of the right of possession." Where the question at issue depends entirely upon whether there has been a compliance with local laws, which, in most cases, determine the right of possession, it would seem difficult to hold that the United States courts could obtain jurisdiction upon the ground that the case involved a federal question, and that the jurisdiction of the state courts would be exclusive. It has been so held.[5] But on a motion to remand a cause removed to the United States Circuit Court from a state court, on the ground that the subject matter of the action arose under the laws of the United States, it was held by MILLER, J., that, as it was impossible that such an action could be determined without reference to, and involving the construction of the mining laws of Congress, the United States court had original jurisdiction, and the case was properly removable.[6] When the adverse claim is filed, it suspends the patent proceedings.

1 MINERS' RIGHTS AND REMEDIES, ch. xiv.

2 Van Dusen vs. Star Q. M. Co., 36 Cal. 571.

3 Rev. Stat. § 2326, *ante* p. 19.

4 Chapman vs. Toy Long, 4 Sawyer, 28; Rose vs. Richmond M. Co., 2 Col. Law Rep. 7; Eureka, &c. Co. vs. Richmond, &c. Co., 4 Sawyer, 302.

5 Trafton vs. Noyes, 4 Sawyer, 178; see also 420 Min. Co. vs. Bullion Min. Co., 9 Nev. 240.

6 Frank, &c. Co. vs. Larimer, &c. Co., 1 Col. Law Rep. 495.

CHAPTER XII.

LAND OFFICE REGULATIONS. — FROM CIRCULAR OF APRIL, 1879.

SECTION 75—Mineral lands open to exploration, occupation and purchase.
76—Status of lode claims located prior to May 10, 1872.
77—Patents for veins or lodes heretofore issued.
78—Manner of locating claims on veins or lodes after May 10, 1872.
79—Tunnel rights.
80—Manner of proceeding to obtain government title to vein or lode claims.
81—Adverse claims.
82—Placer claims.
83—Quantity of placer ground subject to location.
84—Mill sites.
85—Proof of citizenship of mining claimants.
86—Appointment of deputy surveyors of mining claims—charges for surveys and publications—Fees of registers and receivers, etc.
87—Hearings to establish the character of lands.
88—Regulations under the coal land law.

§ 75. Mineral lands open to exploration, occupation, and purchase.—It will be perceived that by the foregoing provisions of law[1] the mineral lands in the public domain, surveyed or unsurveyed, are open to exploration, occupation, and purchase, by all citizens of the United States, and all those who have declared their intention to become such.

[1] Text of U. S. Statutes, *ante*, p. 12, *et seq.*

§ 76. Status of lode claims located prior to May 10, 1872.—By an examination of the several sections of the Revised Statutes it will be seen that the *status* of lode claims located *previous* to the 10th May, 1872, is not changed with regard to their *extent along* the lode or width *of surface*. Mining rights acquired under such previous

locations are, however, enlarged by said Revised Statutes in the following respect, viz.: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of Congress and with state, territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires *ten dollars* shall be expended annually in labor provements on each claim of 100 feet on the

course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues. By decision of the honorable Secretary of the Interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute. Upon the failure of any one of several co-owners of a vein, lode or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners who have performed the labor, or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and, if upon the expiration of ninety days, after such notice in writing, or upon the expiration of 180 days after the first newspaper publication of notice, the delinquent co-owner shall have failed *to contribute his proportion* to meet such expenditure or

improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid.

§ 77. **Patents for veins or lodes heretofore issued.**—Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes or ledges, throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of the claim at the surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges, it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, *other* than the one named in the patent, which were *adversely claimed on the 10th May, 1872*, are excluded from such conveyance by patent. Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the general land-office, and where no adverse rights are affected thereby, patents will be issued, in pursuance of the provisions of the Revised Statutes.

§ 78. **Manner of locating claims on veins or lodes after May 10, 1872.**—From and after the 10th of May, [illegible] any person who is a citizen of the United States, or declared his intention to become a citizen, may

locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet;* but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary, the end lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side, and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of *that width can be taken*, depends upon the local regula-

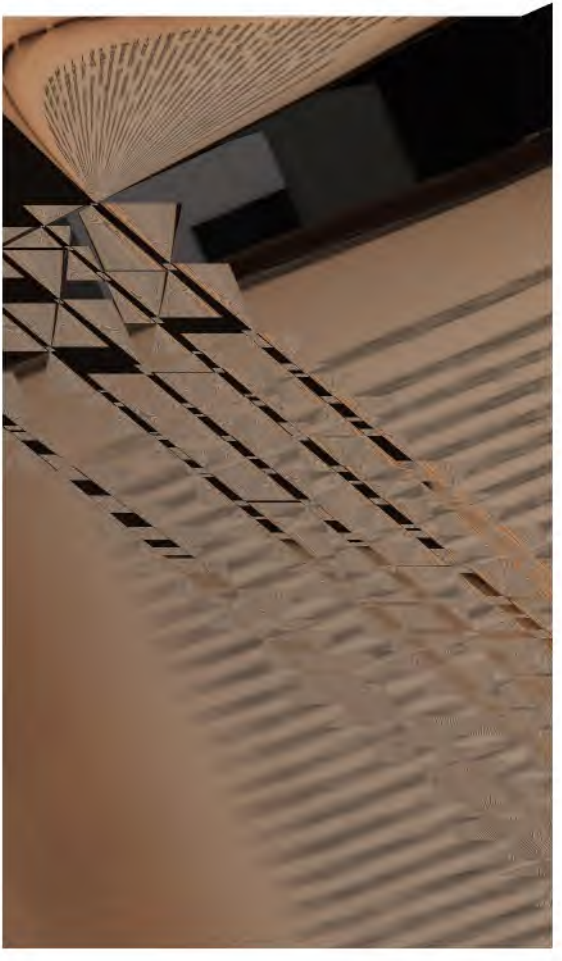
tions or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict with the laws of the United States, or of the state or territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim. The statutes provide that no lode claim shall be recorded until after the discovery of a vein or lode within the limits of the ground claimed; the object of which provision is evidently to prevent the encumbering of the district mining records with useless locations before sufficient work has been done thereon to determine whether a vein or lode has really been discovered or not. The claimant should, therefore, prior to recording his claim, unless the vein can be traced upon the surface, sink a ... or run a tunnel or drift, to a sufficient depth therein ... cover and develop a mineral-bearing vein, lode, or

crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface, and should give the course and distance as nearly as practicable from the discovery shaft on the claim, to some permanent, well known points or objects—such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft, should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery-point. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of

location. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon, within one year from the date of such location, and annually thereafter; in default of which the claim will be subject to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, assigns, or legal representatives, have resumed work thereon after such failure and before such relocation. The expenditures required upon mining claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

§ 79. **Tunnel rights.**—Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement

of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind-lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof*, and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover, it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location, by erecting a substantial post, board or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of *veins or lodes; and at the* time posting such notice they



the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

§ 80. **Manner of proceeding to obtain government title to vein or lode claims.**—By Section 2325 authority is given for granting titles for mines by patent from the government to any person, association or corporation having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law. The claimant is required in the first place to have a correct survey of his claim made under authority of the surveyor-general of the state or territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes, in each case, will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with the other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. The claimant is then required to post a copy of *the plat of such survey* in a conspicuous place upon the

claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine or lode; the mining district and county; whether the location is of record, and, if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat, and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to, and form a part of, said affidavit. Attached to the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz.: Where he claims to be a locator, a full, true and correct copy of such location should be furnished, as the same appears upon the mining records; such copy to be at-

tested by the seal of the recorder, or, if he has no seal, then he should make oath to the same being correct, as shown by his records; where the applicant claims as a locator in company with others, who have since conveyed their interests in the lode to him, a copy of the original record of location should be filed, together with an abstract of title from the proper recorder, under seal or oath as aforesaid, tracing the co-locator's possessory rights in the claim to such applicant for patent; where the applicant claims only as a purchaser for valuable consideration, a copy of the location record must be filed, under seal or upon oath as aforesaid, with an abstract of title certified as above, by the proper recorder, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession, and tend to establish his claim, should be filed. Upon the receipt of these papers the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days, in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. In all cases sixty days must intervene between *the first and the* last insertion of the notice in such

§ 81. **Adverse claims.**—Section 2326 provides for adverse claims, fixes the time within which they shall be filed to have legal effect, and prescribes the manner of their adjustment. Said section requires that the adverse claim shall be filed during the period of publication of notice; that it must be on the oath of the adverse claimant; and that it must show the "*nature*," the "*boundaries*," and the "*extent*" of the adverse claim. In order that this section of law may be properly carried into effect, the following is communicated for the information of all concerned: An adverse mining claim must be filed with the register of the same land office with whom the application for patent was filed, or in his absence with the receiver, and within the sixty days' period of newspaper publication of notice. The adverse notice must be duly sworn to by the person or persons making the same before an officer authorized to administer oaths within the land district, or before the register or receiver; it will fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a mere verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, situation or position with the one against

which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn. The proceedings after *rendition of judgment* by the court in such

case are so clearly defined by the act itself as to render it unnecessary to enlarge thereon in this place.

§ 82. **Placer claims.**—The proceedings to obtain patents for claims usually called placers, including all forms of deposit, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than 20 acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here; it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre. By Section 2330, authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands. It is held, there-

fore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or of parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other *data* required in the notice. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "S. E. ¼ of the S. W. ¼ of N. W. ¼," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. ½ of the W. ½ of the S. W. ¼ of the N. W. ¼ (or the N. ½ of the S. ½ of the N. E. ¼ of the S. E. ¼) of section ——, township ——, range ——," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proof submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement; and the vein or lode must be sur-

veyed and marked upon the plat; the field-note and plat giving the area of the lode claim or claims and the area of the placer separately. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of claimant and one or more witnesses. When an adverse claim is filed to a placer application, the proceedings are the same as in the case of vein or lode claims, already described.

§ 83. **Quantity of placer ground subject to location.** —By Section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys. Section 2331 provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made *by association* of individuals can exceed one hundred and

sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations, so far as the same are applicable; the law requiring, however, that where placer claims are upon *surveyed* public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable. With regard to the proofs necessary to establish the possessory right to a placer claim, Section 2332 provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim." This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways, during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled. When an applicant desires to make his proof of possessory right, in accordance with this provision of law, you will not require him to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will require him to furnish a duly certified copy of the statute of limitations of mining claims for the *state or territory*, together with his sworn state-

ment, giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof, the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or territory as aforesaid, other than that which has been finally decided in favor of the claimant. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case, and are capable of testifying understandingly in the premises. It will be to the advantage of claimants to make their proofs as full and complete as practicable.

§ 84. **Mill sites.**—Section 2337 provides that, "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode *for mining* or milling purposes, such non-adjacent

surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section." To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by Section 2337 United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. In making the survey in a case of this kind, the lode claim should be described in the plat and field notes as "Lot No. 37, A," and the mill site as "Lot No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode for *the statutory period* of sixty days. In making the

platting of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner. The surveyors-general will endeavor to appoint mineral deputy surveyors so that one or more may be located in each mining district for the greater convenience of miners. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them. The law requires that each applicant shall file with the register and receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey; together with all fees and money paid the register and receiver, which sworn statement is required to be transmitted to this office, for the information of the commissioner. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse. The fees payable to the register and receiver for filing and acting upon applications for mineral land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. All fees or charges under this law may be paid in United States currency. The register and receiver will, at the close of each month, forward to this office, an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands *sold, and an* abstract of adverse claims filed. The fees

and purchase money received by registers and receivers must be placed to the credit of the United States in the receivers' monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

§ 87. **Hearings to establish the character of lands.**—Section 2335 provides that all affidavits required under this chapter may be verified before *any* officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same shall have the same force and effect as if taken before the register and receiver of the land office. Hearings of this character, as practically distinguished, are of two kinds: (1) Where lands which are sought to be entered and patented as agricultural are alleged by affidavit to be mineral, or when sought as mineral their non-mineral character is alleged. The proceedings relative to this class are in the nature of a contest between two or more known parties, and the testimony may be taken on personal notice of at least ten days, duly served on all parties, or, if they cannot be found, then by publication for thirty days in a newspaper of general circulation, to be designated by the register of the land office as published nearest to the land in controversy. If publication is made in a weekly newspaper, the notice must be inserted in five consecutive weekly issues thereof. (2) When lands are returned as mineral by the surveyor-general, or are withdrawn as mineral by direction of this office. When such lands are sought to be entered as agricultural, notice must be given *by publication for* thirty days, as aforesaid, and also by

posting in a conspicuous place on each forty acre subdivision of the land claimed, for the same period. All notices must describe the land, give the name and address of the claimant, the character of his claim, and the time, place, and purpose of the hearing. Proof of service of notice, when personal, must consist of either acknowledgement of service indorsed on the citation (which is always desirable), or the affidavit of the party serving the same, giving date, place, and manner of service, indorsed as aforesaid. Proof of publication must be the affidavit of the publisher of the newspaper, stating the period of publication, giving dates, stating whether in a daily or weekly issue, and a copy of the notice so published must be attached to, and form a part of, the affidavit. Proof of posting on the claim must be made by the affidavit of two or more persons, who state when and where the notice was posted; that it remained so posted during the prescribed period, giving dates, and a copy of the notice so posted must be attached to, and made a part of, the affidavits. Proof of notice is indispensable to the regularity of proceedings and must accompany the record in every case. The expense of notice must in every case be paid by the parties thereto. At the hearing there must be filed the affidavit of the publisher of the paper that the said notice was published for the required time, stating when and for how long such publication was made, a printed copy thereof to be attached and made a part of the affidavit. In every case where practicable, in addition to the foregoing, *personal* notice must be served upon the mineral affiants, and upon any parties who may be mining upon or claiming the land. At the hearing the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract c-

tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit, which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivisions such crops are raised: also which of these subdivisions embrace his improvements, giving in detail the extent and value of his improvements, such as house, barn, vineyard, orchard, fencing, etc. It is thought that *bona fide* settlers upon lands really agricultural will be able to show, by a clear, logical, and succinct chain of evidence, that their claims are founded upon law and justice; while parties who have made little or no permanent agricultural improvements, and who only seek title for speculative purposes, on account of the mineral deposits known to themselves to be contained in the land, will be defeated in their intentions. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, every-*thing of importance* bearing upon the question of the

character of the land should be elicited at the hearing. Where the testimony is taken before an officer who does not use a seal, other than the register and receiver, the official character of such officer must be attested by a clerk of a court of record, and the testimony transmitted to the register and receiver, who will thereupon examine and forward the same to this office, with their joint opinion as to the character of the land as shown by the testimony. When the case comes before this office, such an award of the land will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land in any forty-acre tract, the necessary instructions will be issued to enable the agricultural claimant, *at his own expense*, to have the work done, at his option, either by United States deputy, county, or other local surveyor; the survey in such case may be executed in such manner as will segregate the portion of land actually containing the mine, and used as surface ground for the convenient working thereof, from the remainder of the tract, which remainder will be patented to the agriculturist to whom the same may have been awarded, subject, however, to the condition that the land may be entered upon by the proprietor of any vein or lode for which a patent has been issued by the United States for the purpose of extracting and removing the ore from the same, where found to penetrate or intersect the land so patented as agricultural, as stipulated by the mining act. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath. Upon the filing of the plat and field notes of such survey, duly sworn to as *aforesaid, you* will transmit the same to the surveyor-

general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively. In cases where a portion of a forty-acre tract is awarded to an agricultural claimant, and he causes the segregation thereof from the mineral portion, as aforesaid, such agricultural portion will not be given a numerical designation as in the case of surveyed mineral claims, but will simply be described as the "Fractional —— quarter of the —— quarter of section ——, in township ——, of range ——, meridian, containing —— acres, the same being exclusive of the land adjudged to be mineral in said forty-acre tract." The surveyor must correctly compute the area of such agricultural portion, which computation will be verified by the surveyor-general. After the authenticated plat and field notes of the survey have been received from the surveyor-general, this office will issue the necessary order for the entry of the land, and in issuing the receiver's receipt and register's patent certificate you will invariably be governed by the description of the land given in the order from this office. The fees for taking testimony and reducing the same to writing, in these cases, will have to be defrayed by the parties in interest. Where such testimony is taken before any other officer than the register and receiver, the register and receiver will be entitled to no fees. If, upon a review of the testimony at this office, a ten-acre tract should be found to be properly mineral in character, that fact will be no bar to the execution of the settler's legal right to the remaining *non-mineral* portion of his claim, if contiguous. No fear need *be entertained* that miners will be permitted to

make entries of tracts ostensibly as mining claims, which are not mineral, simply for the purpose of obtaining possession and defrauding settlers out of their valuable agricultural improvements; it being almost an impossibility for such a fraud to be consummated under the laws and regulations applicable to obtaining patents for mining claims. The fact that a certain tract of land is decided upon testimony to be mineral in character, is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the Statute of Limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less that five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost, where a survey is required, after which he can enter and pay for the land embraced by his claim.

J. A. WILLIAMSON,
Commissioner.

§ 88. **Regulations under the coal land law.**—DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., April 15, 1880.—*Gentlemen:* The act of Congress approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," is as follows, to wit:[1]

Your attention is called to the following points:

1. The sale of coal lands is provided for—

1. By ordinary private entry under Section 1.

2. By granting a preference right of purchase based on priority of possession and improvement under Section 2.

2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual, he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons, each must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same state or territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding one hundred and sixty acres.

7. Any association may enter not to exceed three hundred and twenty acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than $5,000 in working and improving any coal mine or mines, may enter under Section 2 not exceeding six hundred and forty acres, including such mining improvement.

9. The price per acre is ten dollars where the land is situated *more* than fifteen miles from any completed railroad, and twenty dollars per acre where the land is *within* fifteen miles of such road.

10. Where the land lies *partly within* fifteen miles of such road *and in part outside* such limit, the maximum

price must be paid for all legal subdivisions the greater part of which lies within fifteen miles of such road.

11. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at twenty dollars per acre.

12. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines. and which they shall have in actual possession.

13. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly defined possession must be established.

14. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

15. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under Section 2 by adverse claimants, as the circumstances of each case may justify.

16. In conflicting claims, where improvement has been made *prior to March 3, 1873*, you will, if each party make subsequent compliance with the law, award the

id *by legal subdivisions*, so as to secure to each as far as

possible his valuable improvements; there being no provision in the act allowing a joint entry by parties claiming separate portions of the same legal subdivision.

17. In conflicts, when improvements, etc., have been commenced subsequent to March 3, 1873, or shall be hereafter commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

18. After an entry has been allowed to one party you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

19. Prior to entry it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

20. Notice of contest, in every case where the same is practicable, must be made by reading it to the party to be cited and by leaving a copy with him. This notice must proceed from your office and be signed by the register or receiver. Where such personal service cannot be made by reason of the absence of the party, and because his whereabouts are unknown, a copy may be left at his residence, or, if this is unknown, by posting a copy in a conspicuous place on the tract in controversy, and by publication in a weekly newspaper having the largest general circulation in the vicinity of the land (where no newspaper shall be specified by this office) for five consecutive insertions, covering a period of four weeks next prior to *the trial; and in each* case requiring such notice a copy

must be forwarded with the returns to this office, accompanied with proof of service by affidavit indorsed thereon.

21. In every case of contest all papers in the same must be forwarded to this office for review before an entry is allowed to either party.

22. Thirty days from your decision will be allowed by you to enable any party to take an appeal or file argument to be forwarded to this office.

23. No appeal will be entertained unless the same shall be forwarded through the district land office.

24. The party may still further appeal from the decision of the commissioner of the general land office to the Secretary of the Interior. The appeal must be taken within sixty days after service of notice on the party. This may be filed with the district land officers and by them forwarded, or it may be filed with the commissioner, and must recite the points of exception.

25. If not appealed the decision is by law made final. (See Section 10, act of June 12, 1858, United States Statutes, vol. 11, p. 326.) After appeal thirty days are usually allowed for filing arguments, and the case is then sent to the secretary, whose decision is final and conclusive.

26. Manner of obtaining title: First by private entry. The party will present the following application to the register, and will make oath to the same:

I, —— ——, hereby apply, under the provisions of the act approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," to purchase the —— quarter of section ——, in township —— of range ——, in the district of lands subject to sale at the land office at ——, and containing —— acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have *declared my intention* to become a citizen of the United States),

and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

To this affidavit the register will append the usual jurat.

27. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of purchase money.

28. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the general land office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the commissioner at Washington or by the register at the district land office.

29. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by Section 2.

30. Second. When the application to purchase is based on a priority of possession, etc., as provided for in Section 2, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

39. You will report at the close of each month, as "sales of coal lands," all filings and entries under this act, in separate abstracts, commencing with number *one*, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands, you will continue the same without change. The affidavit required from each claimant at the time of actual purchase will be as follows, to wit:

I, —— ——, claiming the right of purchase under the act of Congress entitled "An act to provide for the sale of the lands of the United States containing coal," approved March 3, 1873, to the —— quarter of section ——, in township —— of range ——, subject to sale at ——, do solemnly swear that I have never had the right of purchase under this act, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of —— dollars, the nature of such improvements being as follows: —— —— ——; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

—— ——.

I, —— ——, of the land office at ——, do hereby certify that the above affidavit was sworn and subscribed to before me this —— day of ——, A.D. 18—.

—— ——.

40. In case the purchaser shows by an affidavit that *he is not* personally acquainted with the character of the

and, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

J. A. WILLIAMSON,
Commissioner.

TO REGISTERS AND RECEIVERS.

[1] *Ante*, p. 26.

CHAPTER XIII.

LAND OFFICE DECISIONS.

SECTION 89—Mineral land open to exploration and purchase.
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136—Mill sites.

§ 89. Mineral land open to exploration and purchase.—It has been decided that the lands designated as mineral are not withdrawn from exploration and purchase as mining claims where they have been entered for agricultural purposes, when they are of little or no value as agricultural lands, but are essential to the proper development of mining claims.[1] And where mineral lands have been included in an agricultural entry, such entry will be canceled upon proper evidence as to the mineral character of the land, at any time before the patent is issued.[2] But unknown and unexcepted *mineral deposits*, in public lands, pass with the title

granted by patent on an agricultural entry.[3] If a patent be applied for, of a mining claim within the boundaries of the agricultural entry, the entry will be canceled as to that portion of the land embraced in the lines of the mining claim.[4] But if an agricultural entry is permitted, without opposition after due notice, it will not be reopened unless mineral claimants have the possessory right to an actual claim, or fraud was practiced by the agricultural claimant.[5] No location of a *town site* upon land known to contain deposits of valuable minerals will exclude the right of the miners to explore such lands.[6] The same is true of an entry under the *homestead law*.[7] And the commissioner of the general land office will render all possible assistance in setting aside an agricultural patent to land embracing a valid mining claim.[8] Mineral lands lying in the *reservations* are not open to exploration and purchase.[9]

1 1 Landowner, 18, 144, 180; 2 *Id.* 82, 146.
2 Copp's Min. Dec. 233. See *Infra*, § 119 *et seq.*; "Hearings," etc.
3 Copp's Min. Dec. 208, 233.
4 Copp's Min. Dec. 163.
5 Copp's Min. Dec. 125.
6 1 Landowner, 51; 2 *Id.* 146; 3 *Id.* 131.
7 4 Landowner, 17.
8 Copp's Min. Dec. 212.
9 Copp's Min. Dec. 208; 5 Landowner, 179; Sickel's Min. Laws, 355.

§ 90. Status of lode claims previously located, preserved by act of 1872.—It is no part of the purpose of the statute to deprive claimants of the benefits of prior locations. The laws, customs and rules in force at the date of location will govern as to extent, when the locators have not seen proper to avail themselves of the more liberal provisions of the new law.[1]

1 *Copp's Min. Dec.* 235; 1 Landowner, 83, 182; 3 Id. 87.

§ 91. **Location of claims.**—By location the miner obtains the exclusive possessory right to the surface ground embraced in his claim, and as an incident thereto the growing timber on the claim.[1] But a location being illegal and void, the subsequent proceedings, even if in due form, would be invalid.[2] So far as the surface ground is concerned, the claim must conform to the location notice and record.[3] However, miners' location notices should not be held to technical accuracy, but are sufficient if they put an honest inquirer in the way of finding the lode. Parol evidence is admissible to show what tract is embraced in the location.[4] One which concluded as follows: "We claim 500 feet easterly and 500 feet westerly, situate about 200 feet easterly from the Sacramento," was held not void for uncertainty in the Ophir mining district, Utah, if made prior to May 10, 1872.[5] Locations of lode claims made under the law of May 10, 1872, must be accurately described and distinctly marked on the ground.[6] There is no provision of law to prevent the location of other claims on the same lode outside the original location, provided that no single location shall exceed 1,500 feet in length.[7] The names of the locators in the notice should be the true ones; and where there is a difference in the given name in the notice, and that which subsequently appears as grantor in a deed, identity of persons must be shown.[8] The patent will only issue for the surface ground embraced within the lines of the location.[9] Lode claims must be in form substantially, parallelograms.[10] Locations are not invalid because made on Sunday, unless prohibited by local law.[11] But one vein can be made the basis of location. The middle of the vein must be ascertained by exploration, or the middle of the discovery shaft taken as the middle of the vein.[12] The location must *comply with* State laws.[13] Locations are void when

made by trespassing upon the possessory rights of others.[14]

1 2 Landowner, 114.
2 Copp's Min. Dec. 190.
3 1 Landowner, 146.
4 2 Landowner, 2. (What is here designated as the "Location Notice" is what is known in Colorado as the "Location Certificate.")
5 1 Landowner, 162.
6 1 Landowner, 135; 6 Landowner, 122.
7 Copp's Min. Dec. 207.
8 1 Landowner, 178.
9 6 Landowner, 171.
10 Sickels' Min. Laws, 36.
11 Sickels' Min. Laws, 43.
12 Sickels' Min. Laws, 36, 119.
13 Sickels' Min. Laws, 43.
14 Sickels' Min. Laws, 48.

§ 92. Tunnel locations.—Tunnel owners have the right to locate 1,500 feet in length of each blind lode, not previously known to exist, discovered in their tunnel.[1] And when the lode is struck they have the option to record their claim to 1,500 feet all on one side of the point of discovery, or partly upon one side and partly upon the other; but they cannot divest the right of possession of other parties, on lodes discovered outside the line of the tunnel, prior to the discovery in the tunnel. Prospecting for blind lodes on the line of the tunnel is prohibited; but this does not prevent others from prospecting by tunnel or otherwise outside the line of the tunnel location.[2] The "line of the tunnel" is the width of the tunnel, and this is the utmost width of ground that can be held by a tunnel location. This width must be marked on the ground.[3] The line of the tunnel marked upon the surface must be from the face or point of commencement, to the terminus of the tunnel.[4] *There is no* provision of law for patenting tun-

nel locations, but claims located thereon may be patented in the same manner as other lode claims.[5] No special amount of labor is required to be done to maintain tunnel rights, but the tunnel must be worked with reasonable diligence, and failure to prosecute work for six months will be considered an abandonment.[6]

1 Copp's Min. Dec. 144.
2 Copp's Min. Dec. 144.
3 3 Landowner, 130; Copp's Min. Dec. 144.
4 Copp's Min. Dec. 144.
5 Copp's Min. Dec. 193.
6 Copp's Min. Dec. 215.

§ 93. **Recording location.**—Parties are bound by the record they make as to date of location.[1]

1 Sickels' Min. Laws, 47.

§ 94. **Annual expenditure on old locations.**—Where several individual locations were made upon a lode, prior to May 10, 1872, and the claims so located are held in common, the entire expenditure of ten dollars for each 100 feet claimed along the lode may be made on any one of such locations.[1] Notice to contribute could not be given to delinquent co-owners, until after January 1, 1875, as the time was by statute extended to that date.[2]

1 Copp's Min. Dec. 136.
2 1 Landowner, 138; 3 *Id.* 66.

§ 95. **Annual expenditure on new locations.**—On claims located subsequent to May 10, 1872, the year for annual labor or improvements, prior to the amendment of January 22, 1880,[1] commenced with the date of location.[2] Such expenditures, as the law requires to be made annually, in order to hold the claim, may be made by running a tunnel for the development of the lode, whether such tunnel be on the claim or not, and will be considered as work done on the claim.[3] The

right of possession depends upon the performance of this labor annually until a patent is issued.[4] And a claim properly located March 1, 1877, might be relocated for forfeiture if the required work was not done prior thereto.[5] Compliance with this requirement should also be shown by an adverse claimant;[6] also, by applicants for patent, in some cases.[7]

[1] *Ante*, p. 17.
[2] Copp's Min. Dec. 142; 4 Landowner, 66.
[3] 1 Landowner, 34.
[4] Copp's Min. Dec. 135, 142; 1 Landowner, 34.
[5] 4 Landowner, 66.
[6] Copp's Min. Dec. 197, 337.
[7] Copp's Min. Dec. 19; 4 Landowner, 50.

§ 96. Same—Time for annual labor under act of January 22, 1880.—The amendment is retroactive, so that on all claims located since May 2, 1872, the labor is required to be performed within the calendar year. The first annual expenditure on a claim located February 1, 1880, become due at the expiration of one year from January 1, 1881, to wit, January 1, 1882, on which day the claim would be subject to adverse location. On a claim located April 8, 1875, it is necessary to calculate from the date of location. The first expenditures are to be reckoned as due within one year from January 1, 1876, and annually thereafter by the calendar year. If the annual expenditures were made within the calendar year, 1879, the claim will become subject to relocation only after the expiration of 1880, and a failure of expenditures for that year.[1] The purpose of the amendment was to secure a uniform period within which the annual expenditures should be required on all locations. It follows that a claim located October 1, 1879, requires an *expenditure of $100* worth of labor or improvements,

during the calendar year 1880, notwithstanding that the required amount may have been extended subsequent to the location during the year 1879. A former opinion to the effect that expenditures in *locating* the claim would be considered as part of the annual expenditures for the year following, overruled as inadvertently given.[2]

1 Sickels' Min. Laws, 392.

2 Sickels' Min. Laws, 393.—NOTE—According to this ruling, immediately on the passage of this act, all claims upon which the annual expenditure had not been made during the calendar year 1879, were open to relocation, although the year, reckoned from the date of location, within which they were required to make the expenditures when the claim was located, had not yet expired. —See *ante*, p. 17.

§ 97. **Annual labor on placer claims.**—No act of Congress requires annual labor or improvements on placer claims. Any such requirement must be by virtue of the local laws, rules or customs.[1]

1 1 Landowner, 18.

§ 98. **Relocation.**—Claims located since May 10, 1872, become subject to relocation for failure to perform, or make the required work or improvements within one year from the date of location.[1] Mines located prior to that date upon which the required amount had been expended at any time since that date, and prior to January 1, 1875, were not subject to relocation at the latter date.[2] Where a party claims a right to a patent by virtue of relocation, he should furnish proof that such relocation was made in accordance with local laws or regulations,[3] and that such claim was subject to relocation.[4] He must also prove the expenditure on the mine of $500, by himself or his grantors, notwithstanding that such amount may have been expended by former owners who had abandoned the claim.[5] Applications for patents by relocators should be accompanied by copy of original

location notice and an abstract of title by the applicant, including the relocation notice, and transfers under the relocation.[6] The expenditure by the relocator may be in the old workings of the mine, or he may commence new ones at his option.[7] Where an adverse relocation is made prior to the application for patent, controversies as to the right of possession must be adjudicated by the courts.[8]

1 Copp's Min. Dec. 142. (Since the act of January 22, 1880, within one year from the 1st of January subsequent to the date of location.—*Ante*, p 17.)
2 1 Landowner, 138.
3 Copp's Min. Dec. 225; 3 Landowner, 37; Sickel's Min. Laws, 55.
4 Copp's Min. Dec. 188; 6 Landowner, 2.
5 1 Landowner, 179.
6 3 Landowner, 37.
7 3 Landowner, 50.
8 Sickel's Min. Laws, 270.

§ 99. **Timber.**—Locators of mining claims have the exclusive right to the timber growing on their claims.[1] By virtue of the grant to the Central Pacific railroad, it is entitled to the timber upon the mineral land within the ten-mile limits, except so much as is necessary to support the improvements of mine owners thereon.[2]

1 2 Landowner, 114.
2 1 Landowner, 134.

§ 100. **Local laws, rules and customs.**—The miners of the district may regulate the width of lode claims within the limits prescribed by act of Congress; but where such local regulations permit locations in excess of 600 feet, or 300 feet on each side of the middle of the vein or lode, they will be restricted according to that width.[1] The same respect is paid to local regulations governing the size of *placer* locations.[2] Where the location was made prior to the Congressional mining acts, *proof will be required* that the location was made accord-

ing to the local customs or regulations of the miners of the district.[3] In the absence of state or territorial legislation, regulating the occupancy and possession of mining claims, the district rules and regulations may be amended by the miners, but such amendments will not affect claims previously located, as they are governed by the laws in force at the date of location.[4] In the absence of local or district laws at the date of location, and subsequent to the Congressional acts, compliance with the laws of Congress must be shown.[5] Where the claim is made under a location prior to any local or district laws, the inception of title will only be from the date of the location notice or certificate in which the names of the claimants or their grantors appear as locators.[6]

1 Copp's Min. Dec. 164, 201.
2 *Ibid.*
3 Copp's Min. Dec. 32.
4 Copp's Min. Dec. 59.
5 Copp's Min. Dec. 200.
6 Copp's Min. Dec. 224.

§ 101. **Abandonment.**—One who abandons a mining claim may remove his machinery, and all ore previously extracted from the mine.[1] Where a 3,000 foot location, under law of 1866 has been re-located under the act of 1872, leaving out 1,500 feet, a relocation by a subsequent purchaser cannot be made to include the original 3,000 feet. The first relocation was an abandonment of 1,500 feet.[2] Where the alleged abandonment of a claim occurred subsequent to application for patent, and prior to payment and entry, the executive department would be compelled to take jurisdiction to determine the conflicting rights of the parties.[3]

1 3 Landowner, 50.
2 Landowner, 162.
3 *Lindsey's Min. Law*, 270.

§ 102. **Patent.—What is conveyed by**—A patent for a lode claim conveys: (1) The surface ground embraced within the exterior boundaries of the claim.[1] (2) The right to follow the vein or lode named, to the longitudinal extent of the patented ground, and to any depth, though the *dip* carries it to the adjoining ground. (3) All other veins, lodes or ledges, throughout their entire depth, the tops or apexes of which lie inside such surface lines extended downward vertically, although such other veins may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location, *provided*, that the right to such outside parts of such other veins shall be confined to such portions as lie between vertical planes drawn downward through the end lines, so continued in their own direction, that such planes shall intersect such exterior parts of such veins, lodes or ledges; provided, also that the other veins were not adversely claimed, on May 10, 1872.[2]

[1] 6 Landowner, 171.
[2] Copp's Min. Dec. 154, 201.

§ 103. **Same—Reservations in.**—There is a reservation in all patents to land in mineral regions, of all previously acquired *water rights;*[1] of the surface ground in all *cross lodes* previously patented;[2] and in placer patents, all lodes "of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit" claimed or known to exist at the date of the patent.[3] And where the ground is within the boundaries of a *town site*, a clause is inserted, "excepting and excluding all town property rights upon the surface, and all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements not belonging to the grantee herein, and all rights necessary to the occupation, possession, and enjoyment of the same."[4] In

one case a reservation was inserted to the effect that only the actual surface ground embraced within the walls of the lode was intended to be conveyed, it being the estimated area of the lode.[5] In railroad grants the mines are reserved, and where a mine has been erroneously granted to a railroad company, and the company fails or refuses to relinquish when called upon, a patent will be issued to the claimant of the mine as though the land had not been granted.[6] So mineral lands are expressly excluded from selections authorized to be made by states,[7] unless at the date of the survey the mineral character of the sections selected is unknown.[8] All previously patented ground is also excepted.[9] Mineral lands are excepted from agricultural patents, which are void as to known mineral lands included therein. Whether the land is mineral, or not, is a question of fact not excluded from inquiry by a previous return of the lands as agricultural.[10]

1 Copp's Min. Dec. 182.
2 2 Landowner, 178.
3 2 Landowner, 82.
4 Copp's Min. Dec. 207.
5 2 Landowner, 5.
6 1 Landowner, 2.
7 Copp's Min. Dec. 30, 40, 105; Sickel's Min. Laws, 438.
8 4 Landowner, 18; 5 Landowner, 178; 6 *id.* 152.
9 1 Landowner, 82.
10 Sickel's Min. Laws, 450.

§ 104. **Same—For what may be issued under mining laws.**—In addition to the valuable minerals specially mentioned in the act of Congress, as giving a mineral character to the public lands thrown open to exploration and purchase, the following have been held to be included in the general terms of the statute, and when found in deposits, to render the land on which they are discovered subject to occupation and purchase under the

mining laws: *Iron*, whether found in lodes or placers;[1] *diamonds*,[2] *fire clay*,[3] *kaoline*,[4] *marble*,[5] *limestone*,[6] *mica*,[7] *slate*,[8] *umber*,[9] *petroleum*,[10] *borax*,[11] and *salt*;[12] though salt springs[13] and sulphur springs[14] have been decided not to be patentable where they were not useful for the deposits of minerals contained therein, but for the water. In addition to these, non-mineral land may be patented as *mill sites* under the mining law.[15] When the public lands are claimed as mineral in character, the test laid down is whether they are more valuable for minerals than for other purposes.[16] The four classes of claims patentable under the mining law are (1) lode claims; (2) placer claims; (3) mill sites; (4) lode claims in connection with mill sites.[17] The term "claim" as applied to lodes is held by the general land office to mean that portion of the vein or lode and adjoining surface to which the claimant has the right of possession by virtue of a compliance with the laws of the United States, and the local laws, rules and customs of miners not in conflict therewith.[18]

1 1 Landowner, 34.
2 Copp's Min. Dec. 140.
3 Copp's Min. Dec. 209.
4 2 Landowner, 66.
5 *Ibid.*
6 *Ibid. Contra*, Sickel's Min. Laws, 626-31.
7 2 Landowner, 131.
8 1 Landowner, 132.
9 1 Londowner, 179.
10 1 Landowner, 179; Sickel's Min. Laws, 438.
11 Copp's Min. Dec. 194.
12 1 Landowner, 19.
13 2 Landowner, 131, 179; 3 *id.* 196.
14 Copp's Min. Dec. 22.
15 2 Landowner, 114.
16 Copp's Min. Dec. 316.
17 1 Landowner, 2.
18 *Copp's Min. Dec.* 142.

come such.[7] The negative of the citizenship of any one but the applicant, through whom the title is traced, must be affirmatively shown by any one contesting the application for patent.[8] And it is not sufficient to show that the claim was located by an alien, but it must be shown that he did not declare his intentions before assigning the claim, as such declaration operates by relation to validate a location[9] or purchase by an alien.[10] If the citizenship or declaration of intention be properly alleged and not denied, the law will be complied with.[11] The commissioner of the general land office may prescribe the form of the affidavit of citizenship. And it has been decided that an affidavit of the date and place of birth must accompany the application, and if naturalized, or intention to become a citizen declared, the date, place and court from which the papers were issued should be named in the affidavit.[12] A purchaser from an alien may acquire the possessory right by relocation, and thus be entitled to apply for and receive a patent.[13]

1 *Infra.* Proof required. 1 Landowner, 66; 6 *Id.* 122.
2 Copp's Min. Dec. 159, 223.
3 3 Landowner, 196.
4 Copp's Min. Dec. 157.
5 3 Landowner, 68, 69.
6 3 Landowner, 18, 69; Copp's Min. Dec. 43.
7 1 Landowner, 98.
8 1 Landowner, 178; 2 *Id.* 2.
9 1 Landowner, 98, 178.
10 3 Landowner, 69.
11 2 Landowner, 68.
12 3 Landowner, 68.
13 3 Landowner, 18.

§ 108. **Same—Where application filed.**—The application should be filed with the register and the receiver of the land office of the land district in which the claim lies; but filing with the register is equivalent to "filing with the register and receiver," according to the spirit of the

act of May 10, 1872.[1] Applications for claims lying partly in one district and partly in another should be *filed* in the district where the principal workings are situated, and the plat and notices should be posted near such workings. A copy of the plat and notice should be posted in the land office of each district.[2] Where two applications conflict, a compromise may be made by the claimants, and the surveyor-general will order a survey of the lines agreed upon.[3]

1 Copp's Min. Dec. 169.
2 2 Landowner, 130.
3 1 Landowner, 83.

§ 109. **Same—Requisites to application for.**—An application for patent to a mining claim should show compliance in all material particulars with the local and United States laws.[1] Applications have been rejected because the *location* was not in accordance with law.[2] Where the *survey* did not accurately define the boundaries of the claim.[3] However, no survey or plat is required in placer applications upon surveyed lands;[4] but the law does not authorize the sale of quartz *lodes* by legal subdivisions.[5] An error in the government survey could not affect the application for placer patent on such lands, as the applicant for a patent should not suffer by the neglect of duty of any officer.[6] Applications will nevertheless be rejected by the general land office on account of erroneous or insufficient description of the premises;[7] because of want of *notice* of the application or that such notice was published without the knowledge and sanction of the register, or not in a newspaper designated as published nearest the claim; and because a previous application for the same premises has been made which was withdrawn on account of the pendency of a suit in court commenced by the adverse claimant.[8] *Those only who have* possessory rights, acquired accord-

ing to law and custom, being entitled to obtain patents,[9] it should in general appear that the *record title* of the applicant is perfect.[10] Copies of deeds or full transcripts from the record of conveyances are not required to show a perfect chain of title. A complete *abstract* of the record title will suffice.[11] And where a mining claim is not situated in a regularly constituted mining district, or where there are available means of having the title recorded, affidavits of the facts should be made and secondary evidence of possessory title will be received in lieu of the abstract.[12] *Ex parte* affidavits may be received in support of the applicant's title, but the officer receiving such testimony should be satisfied of their truth and the credibility of the witnesses.[13] In order to show title where the applicant is a corporation, it must file with the application a copy of its certificate of incorporation or charter.[14] And where an applicant claims title to the mine through a deed signed by a party as executor of a decedent, he should file a certified copy of the letters testamentary, with a copy of the will. If the title depends upon the revocation of letters testamentary or of administration, a certificate of the clerk of the court having probate jurisdiction in the premises, and evidence showing authority to convey the interest of deceased must also be filed.[15] Where a party has obtained title by *proceeding against co-owners for failure to contribute their proportion of annual expenditure*, he should file with his application a copy of the original notice of location, an abstract of all conveyances, a copy of the notice published to delinquent co-owners, embracing the names of all delinquents, with the affidavit of the publisher attached, that the notice was published for the period of ninety consecutive days, giving dates; the affidavit of claimant who made the required expenditure, corroborated by the separate *affidavits* of two disinterested witnesses, showing the

work or improvements done or made upon the claim, and the time when done or made, together with the sworn statement of the claimant as to the failure of the delinquents to contribute during the ninety days' publication or the succeeding ninety days. These requirements would be modified in some particulars, of course, where the notice was personally served on the delinquent co-owners.[16] The application for the patent must be sworn to by the applicant.[17]

1 3 Landowner, 162; 2 *id.* 2.
2 Copp's Min. Dec. 209.
3 Copp's Min. Dec. 340.
4 Copp's Min. Dec. 235.
5 3 Landowner, 18.
6 2 Landowner, 2.
7 Copp's Min. Dec. 204.
8 1 Landowner, 50.
9 Copp's Min. Dec. 19.
10 1 Landowner, 50; Copp's Min. Dec. 204, 340, 157.
11 1 Landowner, 178.
12 Copp's Min. Dec. 147.
13 Copp's Min. Dec. 16.
14 Copp's Min. Dec. 223.
15 3 Landowner, 18.
16 4 Landowner, 50.
17 1 Landowner, 66. See *infra*, § 115, "Affidavits."

§ 110. Same—Filing and posting diagram and notice.—The filing and posting of the plat and notice are important requisites. The plat or diagram required to be posted on the claim should be an exact copy of one to be filed with the application,[1] and must show the necessary expenditures to render the claim patentable.[2] The notice and diagram should be posted on each separate tract or location, even when it is permissible to apply for several in one patent.[3] And the proof of posting for the full time required by law should be by affidavit of *one of the owners at date* of entry, and should be specific

as to when such posting commenced.[4] Where the owners reside out of the district, or are absent therefrom, the affidavit of an authorized agent who is acquainted with the facts, will be sufficient. The amendment of January 22, 1880, to Section 2325 of the Revised Statutes, authorizing the affidavit by an agent, was held to apply to all cases pending at the date of the amendment.[5] In the absence of more convincing evidence to the contrary, this affidavit, when specific in its statements, is deemed satisfactory.[6] Where the affidavit of the party who posted the notice could not be procured, the testimony of two credible witnesses has been received in lieu thereof.[7] The notice and diagram should be drawn and posted in a manner best to subserve the purposes for which they were intended, and when it is evident that they were prepared in a manner to deceive or mislead, the general land office will reopen the case for investigation, or reject the application and require proceedings to be commenced *de novo*.[8] But when the notice is merely somewhat indefinite, the test of its sufficiency is whether anybody was, or could be, misled thereby.[9] The posting of notice five days after publication, and thereafter for the full time, was held to be an irregularity, but not fatal to the application.[10]

1 1 Landowner, 134, 178.
2 1 Landowner, 2.
3 1 Landowner, 134.
4 1 Landowner, 178; 2 *id.* 2; 6 *id.* 71, 92.
5 Sickel's Min. Laws, 495.
6 3 Landowner, 36, 163.
7 Copp's Min. Dec. 233.
8 Copp's Min. Dec, 75.
9 3 Landowner, 162.
10 2 Landowner, 2.

§ 111. **Same—Publication of notice.**—When the published notice does not properly describe the locus of the

claim as the same is set forth in the application and diagram, proceedings should be commenced *de novo*.[1] And adverse claims filed during the time of the first publication should be re-filed, upon notice received of the publication of the corrected notice; but no fee should be charged for such re-filing, and in case suit had been commenced prior to the correction, it will be a stay of proceedings subsequent to publication.[2] An error in the description of the claim, making the published notice inconsistent with itself, will put the adverse claimant on his guard, and will not be treated as fatal to the application unless it is misleading in its character.[3] The law leaves the register no discretion as to the newspaper in which the notice shall be published, except where two papers are equidistant from the claim, or nearly so. He is required to designate the paper, and his designation seems to be conclusive upon the applicant.[4] And where the daily issue of a paper is designated, it is not a compliance with the law to publish the notice in the weekly issue of the same paper without the authority of the register.[5] It is no objection to the paper, the same being *published* nearest the claim, that a part of it is *printed* in another city or state.[6] Publication need be in only one newspaper for the period of sixty days,[7] and in estimating this period, the first day must be excluded.[8] Nine insertions in a weekly newspaper is not publication for the period of sixty days. Notices must be published ten consecutive weeks in weekly papers, and in daily papers sixty days must elapse between the first and last insertions.[9]

1 Copp's Min., Dec., 51, 69.
2 Sickels' Min. Laws, 313.
3 2 Landowner, 114.
4 3 Landowner, 163; *id.* 50.
5 3 Landowner, 18.

6 3 Landowner, 196.
7 1 Landowner, 50.
8 1 Landowner, 66.
9 1 Landowner, 34; 2 *id.* 130.

§ 112. **Same—Survey—Plat—Extent of claims.**—The survey should show the exterior boundaries of the claim and the width shown by the plat should not exceed that allowed by the act of Congress, and the local laws, rules and customs of the state, territory or district.[1] The end lines of a patent survey of a lode claim must be parallel, and where there is a conflict between the description by *courses and distances*, and that by tying to *natural objects*, the former must give way to the latter.[2] The field work of such survey may be made at any time by a United States deputy surveyor,[3] and where any material error occurs in the survey, the applicant should commence *de novo* by filing with the local land officers a corrected plat and field notes, and publish a notice as required in the first instance.[4] An application for patent has the effect of withdrawing a claim from market, and no other survey of the same tract should be approved by the surveyor-general until the first application is approved of.[5] But the mere approval of a survey does not have this effect unless followed by an application within a reasonable time.[6] And parties desiring an order of survey of a claim already surveyed should file with the surveyor-general the register's certificate that no application is pending under the prior survey.[7] The surveyor-general must order the survey of claims as originally located. He has no authority to determine conflicts between rival claims to the same ground.[8] And it is his duty to assign and approve surveys in their regular order, regardless of conflicts.[9] Placer claims embracing five acre lots are required to be surveyed for patents.[10] It is otherwise where *he claims* conform to the legal subdivisions of surveyed

lands.[11] The act of the surveyor-general in approving a survey is not conclusive, as an appeal will lie to the commissioner of the general land office.[12] *Lode claims* located since May 10, 1872, cannot exceed 600 feet in width. Whether they can equal that width depends upon local laws; but in no instance can they be limited by local laws or regulations to less than fifty feet in width, except where adverse rights render such limitation necessary.[13] Claims located in Montana under the territorial act of December 26, 1864, are entitled to fifty feet of surface ground on each side, exclusive of the width of the lode.[14] *Placer claims*, located prior to July 9, 1870, were regulated as to size by the local laws then in force. Subsequent to that date they cannot exceed 160 acres. Subsequent to May 10, 1872, they cannot exceed twenty acres to the individual, or 160 acres for an association of any number of individuals.[15] Errors in the field notes of a deputy United States mineral surveyor should be corrected by himself. It is not proper that the register and receiver should make such corrections.[16] Where a location of a *placer* claim by legal subdivisions would conflict with the rights of *bona fide* mineral, agricultural or other claimants on the same tract, this requirement is waived, otherwise it is mandatory where there has been a public survey of the land.[17] *Lode* claims may not be patented on surveys triangular in shape, unless the lode runs into the acute angle, and then only to avoid conflict with prior rights. The end lines must be parallel, so as properly to limit the rights of owners, in following the *dip* between the extension of the end lines.[18] The form of a claim must be substantially a parallelogram.[19] All surveys of mining claims must be connected with some corner of a public survey, or with some mineral monument, or permanent natural object.[20] *Trees on the water's edge of streams will not* be accepted as permanent natu-

ral objects. The confluence of streams only serves as a point of reference to determine the situation of a mineral monument which has been erected in close proximity.[21] Under the present law *adjoining proprietors* have no right to object, protest, file evidence or appeal on a mere question of survey, until the survey is offered as evidence in an application for patent.[22] In applications for claims located under the act of July 26, 1866, the surveyor-general is instructed not to approve surveys without a certificate from the register that no adverse claims are pending. It is the duty of the register to determine the regularity of proceedings before him, subject to the right of applicants to appeal.[23]

1 Copp's Min. Dec. 191, 195, 223; *id.* 340.
2 3 Landowner, 82.
3 1 Landowner, 133.
4 Copp's Min. Dec. 193.
5 1 Landowner, 133.
6 4 Landowner, 34.
7 4 Landowner, 35; Sickels' Min. Laws, 104.
8 1 Landowner, 133.
9 Sickels' Min. Laws, 100-2-4-7.
10 Copp's Min. Dec. 200, 229.
11 Copp's Min. Dec. 200, 235.
12 1 Landowner, 133.
13 Copp's Min. Dec. 201.
14 3 Landowner, 67.
15 1 Landowner, 134; 5 *id.* 71.
16 5 Landowner, 162.
17 5 Landowner, 162.
18 5 Landowner, 178.
19 Sickels' Min. Laws, 37.
20 6 Landowner, 122.
21 Sickels' Min. Laws, 118.
22 Sickels' Min. Laws, 110.
23 Sickels' Min. Laws, 129.

§ 113. **Instructions to deputy mineral surveyors. where commissioner is ex-officio surveyor-general.** —(1) Must make arrangements with claimant for pay-

ment for services. (2) Begin surveys at some corner of public surveys, and run a line to a corner of claim designating it "Corner No. 1, beginning." (3) From corner No. 1, proceed with survey, giving courses and distances, establish a corner at each angle, and mark intersections with other surveys. (4) Describe corners fully. (5) The corner monuments will be marked 1, 2, etc., and with number of survey. (6) You will note all objects crossed by your lines, such as prior surveys, lodes, ditches, ravines or lines of public surveys. You will note all shafts, and their depths, adits, cuts, drifts, shaft-houses, mills, etc. (7) Report improvements with opinion of value; names of adjoining claimants, if any, and state quarter section, township and range; section lines on plat, *black;* quarter section lines *red*. Field notes on paper of uniform size. (8) Plats will be on paper, 12x16 inches in size, inside marginal line. Four plats and one copy of field notes to be transmitted to general land office for approval. The original field notes will be retained in the general land office, one copy of plat transmitted to register of land district; two plats and one copy of field notes returned to deputy for the applicant, who shall file one copy of plat on the claim, and file one plat and copy of field notes with the register and receiver, with his application. Forward with plat and field notes to general land office affidavits of two responsible parties that not less than $500 has been expended upon the claim in actual labor or improvements, specifying nature and extent of improvements. Corners and distances in field notes should correspond with those on the plat. (9) *Coal lands*, subject to sale only by legal subdivisions.[1]

1 Sickels' Min. Laws, 134.

§ 114. Expenditure for patent—The expenditure of *the requisite amount* ($500) to secure a patent should

appear on the plat and field notes of each application, whether for *lode claims*, *placer claims*, *mill sites*, or *lode claims and mill sites*,[1] these being the four classes of claims for which patents may issue under the mining law. But when the lode claim and mill site are included in one application, the expenditure is not required to be upon the mill site, but only upon the lode.[2] And where the work is done in running a tunnel to develop a lode, it will be considered as done on the lode.[3] Where two or more placer locations are contiguous, and are included in one application, whether by one person or an association of persons, it will be sufficient to show that the requisite amount of expenditure for labor or improvements has been made for the aggregate acreage at any one point.[4] The $500 expenditure should be certified by the surveyor-general, and all improvements having a direct relation to the development of the mine may be taken as a basis for estimating their value.[5]

1 1 Landowner, 2.
2 1 Landowner, 2.
3 1 Landowner, 34; 6 *id.* 122.
4 1 Landowner, 134; 2 *id.* 114.
5 Sickel's Min. Laws, 631.

§ 115. **Same—Proof—Witnesses—Affidavits.**—Proof of improvement may be made by the affidavits of credible persons, who are sufficiently familiar with the claim to be able to testify to the necessary facts.[1] The law provides no compulsory process to secure the attendance of witnesses; but no witness should be excluded on account of his interest in the result.[2] Affidavits authorized under Section 2335 of the act of Congress of May 10, 1872, are required to be taken before an officer in the land district where the claim is situated.[3] A deputy register or receiver *is not* such officer.[4] A notary public is such officer,

and a certificate under his official seal is sufficient evidence of his authority.[5] And it is sufficient that he is authorized to administer oaths *within* the district, though the official act may take place *without* the district, if still within his jurisdiction.[6] An incorporated mining company may verify an application through its officers or authorized agents.[7] The president of the company, in making such affidavit in his official capacity, need not furnish a certificate of his election as such officer.[8] The non-mineral affidavit required in agricultural entries may be made by an agent, upon filing his authority to act in the premises, and furnishing proof that his principal is not personally acquainted with the land.[9] But in contests as to the *character of land*, affidavits, taken without notice to the opposite party, and without opportunity to appear and cross-examine, will not be received in evidence.[10] In the absence of adverse claims the applicant for patent may substitute valid for defective affidavits.[11] But it has been held that an affidavit made in Boston before a commissioner for the State of Nevada would not be sufficient, as not being made before an officer whose jurisdiction included the district.[12]

1 Copp's Min. Dec. 235.

2 Copp's Min. Dec. 16.

3 1 Landowner, 34. The following is the full text of an act of Congress, passed on the 31st of March, 1882:

"A BILL TO AMEND SECTION TWENTY-THREE HUNDRED AND TWENTY-SIX, OF THE REVISED STATUTES, IN REGARD TO MINERAL LANDS. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the *adverse claim before* the clerk of any court of record of the

United States, or of the State or Territory where the adverse claimant may then be, or before any notary public of such state or territory.

"SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any state or territory."

This amendment was promulgated too late to secure insertion in the proper place. Section 2 applies to affidavits required by Sections 2325 and 2335 Revised Statutes, and should have appeared in the compilation.

4 2 Landowner, 162.
5 Copp's Min. Dec. 174.
6 3 Landowner, 195.
7 1 Landowner, 132.
8 Copp's Min. Dec. 173.
9 Copp's Min. Dec. 222.
10 3 Landowner, 67.
11 Sickel's Min. Laws, 81.
12 Sickel's Min. Laws, 82, 298.

§ 116. To whom patent will issue—To whom delivered.—Generally the patent will issue to the one named in the register's final certificate of entry.[1] But a clerical error in the name appearing in the certificate of entry will not invalidate a patent issued in the proper name of the party intended.[2] And where a party becomes a purchaser after the date of entry, an indorsement made upon the duplicate receipt assigning all the applicant's rights will entitle the purchaser to have the patent issued to him.[3] So, where the duplicate receipt has been lost, a patent will be issued upon filing proof of loss and satisfactory evidence that the party is authorized to receive the patent, whether as applicant or purchaser subsequent to application.[4] Under some circumstances patents will be delivered to parties other than the patentees named therein, upon satisfactory showing that they have the possessory title to a mining claim.[5] There is no legal limit to the number of claims one person may secure by

patent, so long as he complies with the laws.[6] Where one purchases pending initial proceedings, but before entry, and files his deed, the register and receiver will be instructed to have the certificates and receipts made out in the name of the purchaser.[7]

1 Copp's Min. Dec. 162.
2 2 Landowner, 2.
3 Copp's Min. Dec. 146, 162.
4 Copp's Min. Dec. 30.
5 Copp's Min. Dec. 85.
6 Copp's Min. Dec. 145.
7 Copp's Min. Dec. 162.

§ 117. **Effect of erroneous issue of patent.**—When issued improperly the patent will be set aside.[1] And where it is necessary to resort to a court of equity for that purpose, on satisfactory proof of the error, or improper issue of the patent, the general land office will furnish the proper party all possible aid to set it aside and acquire title to the mine.[2] Where a patent has been obtained by fraud, upon a record regular upon its face, the general land office will ask the Department of Justice that the party injured be permitted to use the name of the United States in the prosecution of proper proceedings in the courts.[3] But where there are no adverse interests, a patent for a mine will not be disturbed for any irregularities in its issue.[4] The general land office may issue a second patent covering the same ground, for the purpose of correcting a mistake, or inadvertence.[5] And in a subsequent patent it is proper to recite that a prior patent had inadvertently or erroneously issued for part or all of the premises.[6] Parties returning to the general land office patents in which their claims are misdescribed, should indorse thereon a relinquishment, and in case the patent has been recorded, a certificate from the *proper local officer* that the relinquishment has been

recorded. Where conveyances have been made to third parties, their relinquishments of the ground erroneously included in the description must be secured and a duly certified abstract of conveyances furnished.[7]

1 Copp's Min. Dec. 153.
2 Copp's Min. Dec. 212.
3 Copp's Min. Dec. 213.
4 2 Landowner, 2.
5 Copp's Min. Dec. 213.
6 2 Landowner, 2.
7 2 Landowner, 98; Copp's Min. Dec. 41.

§ 118. **Purchase money**—Must be paid, in lawful money of the United States, when a mining claim is entered. *Agricultural College scrip* cannot be received in payment.[1] Where a decision is rendered reducing in size a claim erroneously entered, the purchase money will only be refunded *pro rata*, to make the payment meet the requirements of the law.[2] The payment of the purchase money gives the purchaser a vested right to the patent, and the land ceases to be a part of the public domain.[3]

1 Copp's Min. Dec. 157.
2 Copp's Min. Dec. 32.
3 Smith vs. Van Cliff, 6 Landowner, 2.

§ 119. **Hearings as to character of land.**—The *notice* of the hearing should be prepared and signed by the local land officers. The *testimony* should be taken by questions and answers, and refer to every ten-acre tract.[1] Any person who has knowledge of the character of the land in controversy may appear and testify, regardless of whether such party is interested in the result.[2] Where proper notice was given by agricultural claimants, the general land office will not reopen the case unless the mineral affiants show fraud in pre-emption, or that they have an actual mining claim on the land.[3] But where the non-mineral character of the land is not entirely

clear and satisfactory, the local officers will not permit the entry until the general land office has reviewed the testimony.[4] Land adjudged to be agricultural cannot be entered under the mining laws, unless discoveries or developments have been made showing the land to be more valuable for mining than agricultural purposes, since the former hearing.[5] But land in a mineral belt, near which valuable mines are being worked, and on which prospecting shows favorably, should be treated as mineral land.[6] The testimony may be taken before an officer authorized to take depositions, where the land is situated at such a distance from the local land office as to impose inconvenience upon the parties.[7] Grants by act of Congress of lands surveyed and reported as non-mineral cannot be set aside by the executive department on proof of their mineral character.[8] Every person affected by a decision should be heard.[9] As between placer and town site claimants, testimony as to relative value for placer or town site purposes is irrelevant, as the surface is essential for working a placer claim, and if it is "valuable for minerals," that fact is conclusive in favor of the mineral claimants.[10] As between the Central Pacific railroad and mineral claimants, the ordinary rules for hearings is dispensed with. A list of lands which the company wish to select is presented, and is held for thirty days, while notice, describing the lands, is published in a newspaper of general circulation, nearest the land, setting forth the fact that the company has selected the designated tracts. During the publication any one claiming the lands to be mineral may make oath to the fact, and a hearing shall be had at the expense of mineral affiant, who bears the burden of proof.[11] When hearings are ordered by the commisioner or Secretary of the Interior, in the usual course of examination of entries, the preliminary costs will necessarily be provided from the contingent fund for

registers and receivers; but when parties are brought before the register and receiver, such costs shall be collected and provision required for such further notification as may become necessary in the usual progress of the case to final decision. When the hearing is ordered on the application of a party, a deposit of a sufficient sum should be required before notice of hearing is issued.[12]

1 2 Landowner, 98.
2 2 Landowner, 146.
3 Copp's Min. Dec. 143.
4 Copp's Min. Dec. 94.
5 Copp's Min. Dec. 150.
6 2 Landowner, 180.
7 5 Landowner, 179.
8 5 Landowner, 18.
9 Copp's Min. Dec. 17.
10 Sickels' Min. Laws, 355.
11 Sickels' Min. Laws, 501.
12 Sickels' Min. Laws, 505.

§ 120. **Same—Burden of proof.**—Where land excluded from survey and sale was subsequently returned by the surveyor-general as mineral land, the burden of proof is upon the agricultural claimant. It is always upon the party who denies the correctness of the surveyor-general's return.[1] And where land returned as agricultural has subsequently been withdrawn as mineral, the burden of proof is shifted to the agricultural claimant.[2] Where the land has been returned as agricultural, and as such entered and payment made, and is subsequently alleged to be mineral, the burden of proof is on the mineral claimant.[3] The situation of the land in a well-known mineral region throws the burden of proof on the agricultural claimant.[4]

1 3 Landowner, 130; Sickels' Min. Law, 349.
2 4 Landowner, 19; 6 *id.* 91.
Copp's Min. Dec. 77; 6 Landowner, 91.
ckel's Min. Laws, 355.

§ 121. **Cross lodes.**—Where two veins intersect or cross each other, priority of title governs and entitles the prior locator to all the ore at the point of intersection, without regard to which claim was first patented. The second location has the right of way through the space of intersection.[1]

1 2 Landowner, 178; 3 *id.* 66.

§ 122. **Adverse claims.**—The questions decided by the Department of the Interior, in contests between rival claimants of the possessory title to mining claims on the public domain when patent is applied for, are matters of form. The merits of each case must be decided by the courts.[1] There must be filed a separate and distinct claim against each application alleged to conflict with the rights of the adverse claimant, as it is contrary to the letter and spirit of the law to allow one protest against several applications for distinct parcels.[2] Any member of a mining company having authority may file an adverse claim on behalf of his company.[3] When an adverse claim has been filed, it cannot be amended so as to embrace a larger part of the tract in dispute than that embraced in the original claim,[4] nor can the papers be withdrawn.[5] An adverse claimant desiring to withdraw his opposition to an application, should file a written statement to that effect with the local land officers;[6] or the same result may be accomplished by the dismissal of the suit instituted in support of the adverse claim.[7]

1 3 Landowner, 162; 6 *id.* 34; Sickel's Min. Laws, 270.
2 Copp's Min. Dec. 202.
3 Copp's Min. Dec. 19.
4 Copp's Min. Dec. 156; Sickel's Min. Laws, 208.
5 1 Landowner, 51.
6 1 Landowner, 66.
7 2 Landowner, 68; 1 *id.* 66.

§ 123. Same—Facts necessary to be shown.—The *facts upon which* the adverse claim is based should be set

will not suffice that a portion of the applicant's survey is colored and claimed as the entire claim of the adverse party.[3] The survey should be made and certified by a United States deputy mineral surveyor, together with his certificate or sworn statement as to the approximate value of the labor performed or improvements made upon the adverse party's claim.[4] But where the adverse claimant is prevented by the applicant from making survey and plat, he will be excused from filing the same with his adverse claim.[5] Where the adverse survey shows a conflict, the local land officer cannot infer that the survey of the adverse claim is erroneous, and so decide without a hearing.[6]

1 Copp's Min. Dec. 232.
2 Copp's Min. Dec. 173.
3 1 Landowner, 98; Sickels' Min. Laws, 263-5-75.
4 Copp's Min. Dec. 337.
5 Sickels' Min. Law, 227.
6 Sickels' Min. Law, 267.

§ 126. **Same—Affidavit—Fees.**—Ordinarily the adverse claim must be verified by the oath of the party himself; but where several parties in interest unite, the affidavit of one is sufficient.[1] Also, where the adverse claim is filed on behalf of a corporation, the protest may be verified by the oath of its president or other executive officer, or by an agent or attorney, whose authority must be shown.[2] The adverse claim must be verified before some officer authorized to administer oaths within the land district where the claim may be situated.[3] The *fees* should accompany the adverse claim, otherwise the officers of the local land office have no authority to receive and file it.[4] No fees, however, should be exacted for refiling an adverse claim when it is rendered necessary on account of the republication of notice to correct errors or missions. Nor is there any authority for demanding

fees on the filing of a protest by one who stands to the court in the relation of *amicus curiæ*, though this relation may be the result of filing the adverse claim after the expiration of the period of publication.[5]

[1] Copp's Min. Dec. 169; Sickel's Min. Laws, 231.
[2] 1 Landowner, 132; 2 *id.* 178.
[3] 1 Landowner, 34; Copp's Min. Dec. 158, 160.
[4] 3 Landowner, 36, 163.
[5] Sickel's Min. Laws, 313.

§ 127. Same—Proceedings in court in support of.—In order to continue the stay of proceedings on the application, an action should be commenced by the adverse claimant in a court of competent jurisdiction to try the possessory title. The law requires this to be done within thirty days after filing the adverse claim.[1] And if delay occurs by the adverse claimant or his attorney trusting to the uncertain medium of the United States mail, he must abide the consequences.[2] If a party fails to assert an adverse claim in the manner and within the time prescribed by law, the general land office will not take cognizance of a judgment rendered in his favor in a suit commenced after the expiration of the period of publication.[3] And if the failure to bring suit is caused by the negligence or corrupt conduct of the attorney, it is a wrong which the general land office has no power to redress.[4] But it was held that where suit had been commenced after the application by one who *subsequently* filed an adverse claim in regular form, the application would remain suspended until the case was decided in court or otherwise settled.[5] However, the pendency of a suit by the applicant against the adverse claimant in relation to the same property will not excuse the bringing of the suit by the adverse claimant in support of his claim. It will be too late to bring such suit when the one pending *is dismissed* after the period of publication

has expired.[6] In one case it was decided that in order to comply with the law as to the court in which suit should be brought, it must be in a district court of the state held in the same district in which the claim lay;[7] but upon a rehearing, the commissioner overruled the former decision upon the ground that *jurisdiction* was a question for the court and not for the department to decide.[8] A *judgment* in the suit brought in support of the adverse claim is final between the parties, and if it be against the adverse claimant, he will not be heard to contest the application for the reason that the claim is not on mineral ground.[9] The general land office will neither review nor disregard the decisions of courts upon the merits of cases submitted to them regarding conflicting possessory rights to mining property.[10] But an action in equity to restrain applicants for patent for a mining claim from further prosecution of their application is not such an action as can be taken notice of by the general land office.[11] The only question in such contests is the right of possession.[12] The mere fact of an adverse claimant obtaining judgment in his favor does not necessarily entitle him to a patent upon filing a certified copy of the judgment roll and the certificate of the surveyor-general, and paying fees and price of land.[13] Where a further stay of proceedings is sought after judgment against the adverse claimant upon the ground that a motion for a new trial had been granted, it devolves upon him to show that the motion had been granted without conditions.[14] Where suit is decided in favor of applicant, a copy of the judgment and a certificate of the clerk that no suit is pending should be filed with the register and receiver.[15] Where a suit has been brought during the period of publication and notice thereof given to the register of the land office, it will operate as a stay of proceedings, though the publication

may be found defective and the applicant is required to republish his notice.[16]

1 Rev. Stat. U. S., § 2326, *ante*, p. 19; 2 Landowner, 6.
2 4 Landowner, 34.
3 4 Landowner, 2.
4 4 Landowner, 34.
5 1 Landowner, 135.
6 2 Landowner, 5.
7 6 Landowner, 105.
8 Sickel's Min. Laws, 298.
9 3 Landowner, 2.
10 Copp's Min. Dec. 19.
11 1 Landowner, 162.
12 2 Landowner, 5.
13 2 Landowner, 2.
14 Copp's Min. Dec. 149.
15 Copp's Min. Dec. 232.
16 Sickel's Min. Laws, 313.

§ 128. **Same—Effect of waiver by applicant.**—When the applicant for a patent before the department becomes a defendant in a suit brought by an adverse claimant, waives his claim, confesses judgment, and thus acknowledges plaintiff's superior right to the disputed ground, the controversy is ended, and plaintiff should no longer be deprived of a patent for the premises to which he has shown himself legally entitled.[1] But the mere filing of an abandonment of the disputed ground does not terminate the contest. The judgment of the court must go to all the questions involved in the controversy before patent can issue for the portion of the claim not in dispute.[2]

1 3 Landowner, 194.
2 3 Landowner, 196.

§ 129. **Same—Waiver by adverse claimant.**—The contest may be determined either before or after suit brought, by the express waiver of the adverse claim, by filing a *written withdrawal* in the local land office,[1] or by

stipulations filed in court, consenting to a dismissal of the action.[2] In addition to this express waiver, the same result will be conclusively presumed against the rights of the adverse claimant by his failure to file his claim within the period of publication, whether from voluntary *laches* or from ignorance of the pending application;[3] by his failure to institute suit within thirty days of filing his adverse claim;[4] by his failure to prosecute the suit with reasonable diligence.[5] But the question as to whether reasonable diligence has been used in prosecuting the case is for the court.[6] It has been decided, that by the adverse claimant failing to notify the local land officers of the commencement of the suit, he waived the adverse claim.[7] But it has since been held by the commissioner, that although compliance with this regulation is desirable as a matter of convenience to the department, a failure to give such notice cannot deprive a party of his right under the law to be heard, and the burden of proof rests with the applicant to show that suit has not been commenced.[8] But where complaint was filed in the State of Colorado, where the code required the issue of summons within thirty days, in order to give the case any standing in court, it was held that the mere filing of the complaint, without the issue of summons, as required by the state statute, was not the commencement of an action.[9] The dismissal of the suit operates so conclusively upon the adverse claimant that the proceedings for a patent cannot be again stayed by commencing the action *de novo* after the lapse of the statutory period.[10] So, where the suit has been dismissed for want of prosecution, the patent proceedings cannot be again suspended by reinstating the case in court.[11] But where one of several co-owners made out a *prima facie* adverse showing to an application for patent, and his co-tenants sub-

sequently withdrew this adverse claim, their withdrawal could not prejudice the rights of the adverse claimant.[12]

1 1 Landowner, 66.
2 2 Landowner, 68.
3 4 Landowner, 2.
4 Copp's Min. Dec. 145; 2 Landowner, 6.
5 3 Landowner, 98; 6 *id.* 75.
6 Sickels' Min. Laws, 288.
7 2 Landowner, 82.
8 Sickels' Min. Laws, 238.
9 Sickels' Min. Laws, 291.
10 1 Landowner, 66.
11 Copp's Min. Dec. 23; Sickels' Min. Laws, 299.
12 Copp's Min. Dec. 158.

§ 130. Conflicts not considered as adverse claims.—The right which the law gives to the owner of a *lode claim* to follow the dip of his vein under adjoining lands is not the subject of an adverse claim by an adjoining proprietor.[1] The patentee of a claim need not file an adverse claim to an application for patent for a cross lode, or other conflicting claim. The ground already patented will be excepted from the subsequent patent.[2] Opposition by *lienholders* is equally unnecessary, as their rights are fully protected.[3] So also are *easements* protected in such a manner as not to be affected by the issue of a patent, and consequently the owner of an easement cannot maintain an adverse claim so as to bring about a suspension of patent proceedings.[4] Mere hypothetical controversies, which may and ought to be adjusted in the courts, will furnish no grounds for suspending the disposal of the public lands, pending their adjustment. The conflict of interest must be real and substantial.[5] Where application is for a lode located prior to May 10, 1872, patent excepts all lodes but the one applied for, and an adverse *claim by* subsequent locator for surface

ground will not lie.[6] A public highway is not an adverse claim.[7]

1 Copp's Min. Dec. 101; 6 Landowner, 73; Sickels' Min. Laws, 252-4-60.
2 2 Landowner, 114, 115.
3 Act Cong. July 9, 1870, *ante*, p. 21; Copp's Min. Dec. 45.
4 Act Cong. July 26, 1866, § 5, *ante*, pp. 23-24; Copp's Min. Dec. 42; Sickels' Min. Law, 245.
5 Copp's Min. Dec. 96; 4 Landowner, 3.
6 Sickels' Min. Laws, 194.
7 Copp's Min. Dec. 43; Sickels' Min. Laws, 245.

§ 131. **Protests**—Which do not assert title in protestant, or otherwise comply with laws in relation to *adverse claims*, should always be received by the local land officers and forwarded as part of the record, without exacting fees. Protestant is merely *amicus curiæ*, and has no right of appeal.[1]

1 Sickels' Min. Law, 313-14.

§ 132. **Appeals.**—A written statement of the points of exception to the commissioner's decision is required on appeal to the Secretary of the Interior.[1] No new or additional evidence can be submitted to the secretary on appeal.[2] An appeal brings up all proceedings had prior to the order appealed from, and all exceptions must be presented at the hearing of such appeal, or in default, they will be considered waived.[3] A protestant standing in the relation of *amicus curiæ* has no right of appeal.[4] An appeal of an *adverse case*, to the Supreme Court of the United States should not further stay patent proceedings.[5] The rule that the ordering of hearings is within the discretion of the commissioner, from whose [illegible]ision no appeal lies, only applies to rehearings.[6] [illegible] days are allowed for filing notice of appeal after [illegible] notice of decision. Service of notice on at[illegible]esident in Washington is sufficient. A notice

is not served within the time, the case will be closed, and the decision of the commissioner become final. After service of notice the appellant has thirty days additional for filing points of exception and argument. The local land officers have no authority to extend the time for appeal. This can only be done by the commissioner.[7] A paper addressed to the local land officers, notifying them that an appeal was taken from their decision in a particular case, to the commissioner, would not operate as an appeal from the commissioner to the Secretary of the Interior; but, being defective, the appellant should be notified, and upon failure to amend, the appeal should be dismissed, and the case closed.[8]

1 Copp's Min. Dec. 217.
2 Copp's Min. Dec. 136.
3 Copp's Min. Dec. 181.
4 3 Landowner, 194; 4 *id.* 3, 34; 6 *id.* 3.
5 2 Landowner, 5.
6 6 Landowner, 4.
7 6 Landowner, 124.
8 Sickels' Min. Laws, 509.

§ 133. **Easements.**—In case a mine is surrounded by other property, and it is necessary to have ingress and egress secured, no specific condition will be inserted in the patent, but the provisions of Section 2338, Revised Statutes of the United States, relative to easements, drainage, etc., will be inserted.[1]

1 5 Landowner, 146.

§ 134. **Town sites.**—No title can be acquired to any known mineral lands or valid mining claim under a town site patent.[1] An application for patent for a town site is no objection to the issuing of a patent for a lode claim embraced within the limits of the town site application.[2] But the surface rights of owners of town property will be protected by proper exceptions in the patent for the

mining claim.[3] However, land that is mineral is subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for town site purposes.[4] A town site is an adverse claim.[5]

1 1 Landowner, 51; 3 *id.* 131.
2 2 Landowner, 146.
3 Copp's Min. Dec. 207.
4 6 Landowner, 3.
5 Sickel's Min. Laws, 302.

§ 135. **Water rights.**—In disposing of public lands upon which water rights have been secured by prior appropriation, and which at the time of such disposal are recognized by local customs, laws, and decisions of the courts, the United States will maintain and protect them as vested rights.[1]

1 Copp's Min. Dec. 24.

§ 136. **Mill sites**—Must be located on non-mineral land.[1] They may be located under the mining laws and should be *recorded*.[2] They pass to a railroad as non-mineral land, if located on a railroad section after the grant to the railroad took effect.[3] An applicant for a patent for a mill site on which a lode exists, claimed by other parties, may file an abandonment of the lode claim, and will receive a patent for the remaining part of the mill site location.[4] Where a mill site and lode claim are applied for in connection, the $500 expenditure is only required on the lode claim; but when applied for separately the expenditure of that amount must be shown on the mill site.[5] Coal lands are not subject to entry under the timber culture laws. Such an entry will be cancelled upon receipt of an affidavit that such lands have been embraced therein.[6] The act to provide for the sale of the lands of the United States containing coal relates to all

lands containing any variety of coal, whether anthracite, bituminous, lignite or cannel.[7]

1 4 Landowner, 3.
2 2 Landowner, 114.
3 Copp's Min. Dec. 142.
4 1 Landowner, 82.
5 1 Landowner, 2.
6 5 Landowner, 146.
7 Sickel's Min. Laws, 337.

CHAPTER XIV.

MINERS' RIGHTS AND REMEDIES.

SECTION 137—Vested rights to mining claims.
138—Right to mine, private property.
139—Certainty of tenure.
140—Distinctions used in designating right and title.
141—Local conditions to acquisition and enjoyment of miners' rights.
142—Same—Local regulations prior to acts of Congress—Width.
143—Same—Location.
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146—How boundaries defined.
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149—Same—Town lots.
150—Same—Drainage—Ditches—Right of way—Dumps—Tailings.
151—Tenancy in common.
151*a*—Mining partnership.
152—Corporations.
153—Mining claims, real estate.
154—Conveyance of mining claims.
155—Mining contracts.
156—Miners' liens.
157—Taxation.
158—Remedies and Procedure—Trespass, ejectment, *forcible entry*, etc.—Injunction, actions to quiet title.
159—Pleading.
160—Jurisdiction.

§ 137. **Vested right to mining claims.**—While it is true that the mere assertion of a possessory title to portions of the public domain, for mining or other purposes, gives the claimant no indefeasible right to occupy the land as against the general government, and in this respect cannot be called a *vested* right, it assumes this character as between the possessor and all the world, excepting the superior proprietor. And even as between the government and those who have taken possession under the conditions imposed by law, and assumed the burdens attached to the rights conceded to mineral claimants, something more than a mere license to occupy their claims on sufferance must be intended by the concession. The discovery of valuable mineral, the labor and expense of location, the survey and recording of claims, with the subsequent annual expenditure,—all going to enhance the value of the property,—are of such pecuniary value as to stand in lieu of a consideration paid for the promised security of possession and enjoyment which the mining statutes hold out to the miner as inducements to undertake the development of the mineral resources of a country valueless for other purposes. Therefore, even while the title remains in the government, it is both the policy of the law and the inclination of the courts in construing the law, to regard the rights of miners on the public domain as vested, in that sense that entitles them to full constitutional protection from deprivation or diminution, without due process of law.[1]

[1] Merced Min. Co. vs. Fremont, 7 Cal. 317; McGarrity vs. Byington, 12 Cal. 426; Hughes vs. Devlin, 23 Cal. 501.

§ 138. **Right to mine, private property.**—The above views with respect to the rights of miners are confirmed by the numerous decisions in which it has been held that

such rights are proprietary in their nature, even when exercised upon land of which the government holds the title. The possessory right is recognized as private property in order to become subject to taxation,[1] when not exempt by local laws. It is recognized as property in order to render it subject to execution on an ordinary judgment.[2] It is treated as private property, subject to the laws of inheritance and to special execution to satisfy a lien.[3] It is regarded as real estate, or an interest therein, for the purpose of fixing the venue of actions concerning it, and also as to modes of transfer, descent and partition.[4] It would, therefore, fall within the protection of the constitutional inhibition of laws which deprive persons of private property without due process of law.[5]

1 State vs. Moore, 12 Cal. 56.
2 McKeon vs. Bisbee, 9 Cal. 137.
3 Forbes vs. Gracey, 94 U. S. 762.
4 Watts vs. White, 13 Cal. 321; Quirk vs. Folk, 47 Cal. 453; McKeon vs. Bisbee, 9 Cal. 137; Halsey vs. Martin, 22 Cal. 645; Hughes vs. Devlin, 23 Cal. 501; Harris vs. Equator, &c. Co., 2 Col. Law Rep. 63.
5 Const. U. S., Art. V., Amendments.

§ 139. **Certainty of tenure.**—Rights acquired by a compliance with the mining law are presumed to continue in those by whom they were originally acquired until there is some evidence of transfer or abandonment.[1] When such rights attach to a definite portion of the public domain, it requires positive acts or omissions of duty to divest them or reduce the extent of the right so acquired. The tenure by which they are held is not so precarious that they may be divested, or the boundaries of the claim changed so as to reduce the extent of the vested right, by mere declarations of the officers of a corporation which has been clothed with the right, by

compliance with all the conditions fixed by law, to its holding.[2]

[1] Mallet vs. Uncle Sam, &c. Co., 1 Nev. 188; Oreamuno vs. Uncle Sam, &c. Co., 1 Nev. 215.
[2] Overman S. M. Co. vs. American M. Co., 7 Nev. 312.

§ 140. **Distinctions used in designating right and title.**—And yet, notwithstanding the proprietary nature of this right, a distinction has been made between the manner in which it is characterized and that in which the title to real estate is designated. The words "mining ground," when used in a deed, have been held to have a technical meaning which applied only to the interest which a mere occupant had in the premises—in other words, a claim—and were not the words used when the fee simple or leasehold interest in real estate were intended to be conveyed.[1]

[1] Hale & Norcross, &c. Co. vs. Storey County, 1 Nev. 104; State vs. Real del Monte, 1 Nev. 523.

§ 141. **Local conditions to acquisition and enjoyment of miners' rights.**—Many of the conditions precedent and subsequent upon which miners become entitled to appropriate portions of the public domain to their exclusive use, and work the same, were prescribed by local rules and customs which had their origin prior to any statutory provisions on the subject,[1] were subsequently recognized by both legislatures and courts.[2] The acts of Congress subsequently passed, substantially embodied and set forth in the Revised Statutes,[3] have not prescribed with particularity what those conditions should be, but have left them still in a great measure to local regulation. The matters, with respect to which the details are left to local legislatures or district regulation, are (1)—within limits—the width of lode claims;[4] (2) location of claims; (3) manner of recording; (4) the

amount of work necessary to hold possession; (5) manner in which boundaries shall be defined;[5] (6) statutory limitation of actions involving the possessory right, and (7) rules for working mines, involving easements, drainage, and other necessary means to their complete development.[6] The following compilation of state statutes shows, in part at least, what has been done by the local legislatures in the way of supplying the deficiencies of the general law.[7]

1 *Ante*, Ch. I., §§ 1-2.
2 *Ibid*, §§ 2-3.
3 *Ante*, Ch. II., § 12 *et seq.*
4 Rev. Stat., § 2320, *ante*, p. 14.
5 Rev. Stat. U. S., § 2324, *ante*, p. 15.
6 Rev. Stat. U. S., § 2338, *ante*, pp. 23-4.
7 *Post*, Ch. XV.

§ 142. Same—Local regulations prior to acts of Congress—Width.—In the early history of lode mining in California, while the length of claims was fixed by district rules with more or less accuracy, considerable latitude seems to have been indulged as to the proper width, so that it often became a question of *fact* whether the ground taken was excessive in amount; claims being held by a possessory title independent of any statutory authority that could be construed into even a temporary license from the proprietor.[1] The proper boundaries of a claim in its lateral extent were often determined by custom in order to ascertain the extent of the claimant's constructive possession; for where such boundaries were described in a deed, and the quantity described was in excess of that allowed by local rules or customs, it was held that the constructive possession of the grantee would not extend to the unauthorized boundaries.[2] Where held by actual possession, and the extent of the claim was marked by distinct and visible monuments, the posses-

sion would extend to the entire claim.[3] In the absence of any local custom in force, giving constructive possession to mining ground on the posting of notice on the claim, giving the length of the claim without defined boundaries, such a location would not support a judgment for possession of the claim.[4] But where the claim was held according to the customs of miners in a given district, the possession constructively extended to the customary limits.[5]

1 *Ante*, Ch. I., § 1 *et seq.*

2 English vs. Johnson, 17 Cal. 107.

3 Table Mountain, &c. Co. vs. Stranahan, 20 Cal. 198; Hess vs. Winder, 30 Cal. 349; Conger vs. Weaver, 6 Cal. 548.

4 Morenhaut vs. Wilson, 52 Cal. 263; Gelcich vs. Moriarity, 53 Cal. 217.

5 Hicks vs. Bell, 3 Cal. 219.

§ 143. **Same — Location.** — The rights acquired to mining property, which were recognized by the courts in the early history of the prosecution of this branch of industry on the public domain, were obtained by two methods: *First*, possession taken independent of mining regulations, which extended only to the ground actually occupied within well defined boundaries.[1] And, *second*, where the claim was *located* according to district rules. When the claim was taken by the latter method the rules and customs of the district might prescribe the limits without strict dependence upon actual occupancy or definite boundaries.[2] The matter of prime importance in old locations seems to have been *notice*, by which others could learn not only that a claim had been taken, but for what purposes the ground was appropriated. For no conflict was recognized to locations of the same ground for different purposes not inconsistent with each other, as for fluming purposes and the deposit of tailings by one party, and for the purposes of mining by an-

other, provided the subsequent location did not obstruct the free use of the ground by the prior locator in the prosecution of the business for which it was located.[3] The notice was also necessary to inform others of the direction from the point of discovery, in which the claim lay. In lode claims, the location was intended and supposed to be on the lode, and the claim was a right to follow it through all its supposed meanderings, dips, and angles. But a misdescription in the notice as to the direction of the lode, where it was impracticable to give it more accurately, was held not to vitiate the location in favor of a subsequent locator on the same vein.[4] And in a contest between the locators of a ditch and of a mining claim, it was held that a slight divergence from the original line on which the ditch was located, where both lines ran through the mining claim located at a time intermediate between the original location of the ditch and the change in lines, would not materially affect the rights of the parties to the ground in question.[5] The locator of a claim must take the ground as he finds it, subject to all prior rights, including such incidental rights as are essential to the enjoyment of the ground claimed for any legitimate purpose.[6] The notice will frequently govern as to the character of the claim taken, from the language used, as it may describe the incidents of one kind of claim or another. As where it claimed twelve hundred feet of ground "for mining purposes," following the particular description by the words, "with all its dips, angles, and spurs," it was held that these words referred to a *lode*, and not to *surface* claims.[7] It has also been held with respect to the *notice*, that it is not essential to a valid location by posting notice, that it should be placed on the vein or ore body itself; but that it would suffice if placed within such proximity as to notify any one of what *was claimed*.[8] But though some slight divergence from

district rules as to location, where the rule is merely directory, may be sanctioned, there must be a substantial compliance with the district regulations to constitute a valid location.[9] Such local rules, by general recognition, have the effect of positive laws when not in conflict with the statute, and are to be construed accordingly.[10] The claim being for the particular lode and sufficient lateral ground for working purposes, it did not follow in every instance that the original claimant could hold the side veins by virtue of his prior location.[11] The locators whose names appear in the notice become tenants in common, regardless of whether they were all alike active in making the location or not.[12] The location may be made by an agent.[13] Under district rules and local laws a definite quantity of work was required in order to complete the location. But the time within which this should be done is not always definitely expressed. It is in some cases required to be done "in a reasonable time" after discovery. When the facts are undisputed it has been held that what is a reasonable time is a question of law.[14] And where it was conceded that the labor was not commenced until after the expiration of sixty days after the discovery, and was completed by sinking a shaft ten feet deep, nine feet long, and five feet wide, in twenty-five days, the time—eighty-five days from discovery—was held unreasonably long.[15] Where the law of the state,[16] in harmony with the federal law, required the location to be described by reference to permanent monuments or natural objects, it was held that describing a claim as "situated on the north side of Iowa Gulch, about timber line, on the west side of Bald Mountain, said claim is staked and marked as the law requires," was not a compliance with the statute.[17]

1 English vs. Johnson, 17 Cal. 107; Table Mountain, &c. Co. vs. Canahan, 20 Cal. 198; Hess vs. Winder, 30 Cal. 349.

2 *Ibid;* Table Mountain, &c. Co. vs. Stranahan, 31 Cal. 387; Atwood vs. Fricot, 17 Cal. 37.

3 O'Keefe vs. Cunningham, 9 Cal. 589.

4 Johnson vs. Parks, 10 Cal. 446.

5 Conger vs. Weaver, 6 Cal. 548.

6 Irwin vs. Phillips, 5 Cal. 140; Sims vs. Smith, 7 Cal. 148; Weimer vs. Lowery, 11 Cal. 104; Martin vs. Brown, 11 Cal. 12; Butte Canal, &c. Co. vs. Vaughn, 11 Cal. 143.

7 Weill vs. Lucerne M. Co., 11 Nev. 200.

8 Phillpots vs. Blaisdell, 8 Nev. 61.

9 Oreamuno vs. Uncle Sam, &c. Co., 1 Nev. 215; Mallet vs. Uncle Sam M. Co., 1 Nev. 188; Sullivan vs. Heuse, 2 Col. 424.

10 Golden Fleece Co. vs. Cable Co., 12 Nev. 312.

11 Van Valkenburg vs. Huff, 1 Nev. 142.

12 Chase vs. Savage &c. Co., 2 Nev. 9; Morton vs. Solombo, &c. Co., 26 Cal. 527.

13 Murley vs. Ennis, 2 Col. 300.

14 Wiggins vs. Buckham, 10 Wall. 129; Leaming vs. Wise, 73 Pa. St. 173; Morgan vs. McKee, 77 Pa. St. 228; Douse vs. Wheeler, 26 Mich. 195; Nudd vs. Wells, 11 Wis. 417; Patterson vs. Hitchcock, 3 Col. 533.

15 Patterson vs. Hitchcock, *supra.*

16 Colorado, *post,* Ch. XV.

17 Faxon vs. Barnard, 1 Col. Law Rep. 145.

§ 144. Same—Recording.—The act of Congress of 1872 seems to take the recording of claims as a matter of course, but leaves the manner in which it shall be done to local regulation, merely providing, for the purpose of rendering local laws effective in this respect, that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument, as will identify the claim."[1] Beyond this the record is to be provided for by the local law or district rules. If not so provided for, either before or after the passage of the federal statute, the recording of claims is not, and never was, *obligatory,* and evidence of failure in this respect would be irrelevant, although there might be a dis-

trict officer who kept a record of mining claims.[2] Nor would the record itself, in the absence of a law or rule requiring the record to be made, be admissible in evidence to prove the location or transfer of interest.[3] But when the location notice or certificate, or a written transfer of the claim has been recorded pursuant to district rules, such record is admissible in evidence; and where the original records were destroyed and new ones made by the same authority, they have been held admissible.[4] It has been held that the requirement to file a certificate of location for record within a prescribed time was obligatory upon the locator in order to secure the claim from the date of discovery against intervening claimants seeking to locate the same ground; but that a failure to record within the time would not invalidate the location, provided the law were complied with before any conflicting rights to the same ground had been acquired.[5] Elsewhere it has been held by high authority that the effect of recording claims, or a failure to record, cannot be greater than under the registration laws — notice of the right claimed — which may be communicated by actual possession, or other means.[6] If the inference drawn from the ruling in this case is correct, the only one who could avail himself, as a subsequent claimant, of a failure to record a prior location, would be a subsequent *bona fide* purchaser or locator.[7] In a still later case it was held that where the location itself was notice to all the world, an error in the record, committed by the recorder, would not affect the rights of the locator.[8] The record does not necessarily disclose the title, so that a purchaser may safely rely thereon, as in the purchase of ordinary real estate.[9] The record of claims is held to serve a double purpose. As between the claimant and the government, it preserves a memorial of the lands appropriated, after monuments, in their nature perishable,

are swept away. It also supplements the surface marking, in giving notice to third persons.[10]

1 Rev. Stat. U. S., § 2324, *ante*, p. 15.
2 Golden Fleece Co. vs. Cable Co., 12 Nev. 312.
3 Atwood vs. Fricot, 17 Cal. 37.
4 McGarrity vs. Byington, 12 Cal. 426.
5 Faxon vs. Barnard, 1 Col. Law Rep. 145.
6 Campbell vs. Rankin, 99 U. S. 261.
7 See Pollard vs. Shively, 1 Col. Law Rep. 230 (to be reported in 5 Col.)
8 Myers vs. Spooner, 55 Cal. 257.
9 Patterson vs. Hitchcock, 3 Col. 533.
10 Pollard vs. Shively, 1 Col. Law Rep. 230 (citing Golden Fleece, &c. Co. vs. Cable Co., 12 Nev. 312; Gleason vs. Martin White M. Co., 13 Nev. 471).

§ 145. **Amount of work necessary to hold possession.**—This includes (1) location work, and (2) annual labor and improvements, with the qualification that the latter shall not be less than one hundred dollars annually on all lode claims located since May 10, 1872, and ten dollars for each one hundred feet of all such claims located prior to that date.[1] As the local legislatures have, for the most part, prescribed the character and amount of work necessary to complete the location of claims, as well as the time within which such work should be done, the old district rules, which were almost as diverse in their requirements as the districts were numerous, have become obsolete, except in determining the validity of old locations. But some of the early decisions as to the amount of work necessary to hold the claim will apply to the construction of the statutes, both federal and local. It was held where labor on the claim two days out of every ten should be performed in order to hold it, that labor employed in getting necessary machinery on the ground, and in digging a drain on adjoining land so as to facilitate the work, *should be* accredited as work done on the claim.[2]

But such outside work, to have such effect, must have direct reference to the claim to be held thereby.[3] Forfeiture, which is the consequence of failure to perform annual labor, is never presumed, but the law is construed strictly against such result.[4] It must be specially pleaded when relied on in an action.[5] And it has been held that the failure to perform annual labor does not authorize any one to invade a claim in the actual possession of the delinquent and oust him therefrom.[6]

1 Rev. Stat. U. S., § 2324 and Amendment, *ante*, pp. 15–16
2 Packer vs. Heaton, 9 Cal. 568.
3 McGarrity vs. Byington, 12 Cal. 426.
4 Waring vs. Crow, 11 Cal. 366; Dutch Flat, &c. Co. vs. Mooney, 12 Cal. 534; Coleman vs. Clements, 23 Cal. 245.
5 Dutch Flat, &c. Co. vs. Mooney, *supra*.
6 Brady vs. Lee, 38 Cal. 362.

§ 146. How boundaries defined. — The manner in which boundaries are required to be defined is left by the federal law to local regulation, with the proviso that "the location must be distinctly marked on the ground so that its boundaries can be readily traced."[1] It has been held that a line of stakes running lengthwise through the center of a lode claim, with the lateral ground claimed on each side marked thereon, is sufficient to satisfy the law in this respect.[2] But the local requirements are more specific.[3] And the mere posting of a notice on a tree at each end of a claim has been held insufficient compliance with the act of Congress above cited.[4] Whatever the local regulations are, whether prescribed by state or territorial legislatures or by district rules, there should be a substantial compliance in order to secure the full protection of the law.[5] Marking the boundaries as required by statute is one of the first steps toward location. It serves a double purpose. It determines the right of the claim-

between himself and the general government, and

notifies third persons of his rights. It was accordingly held under the provisions of a statute requiring side posts to be set in the center of the side lines,[6] that though placing such posts within 150 feet of the center was not a substantial compliance with the statute, still it would be an unnecessarily harsh and unreasonable construction of a beneficent statute to hold that, the claim being otherwise marked as required by statute, so that the boundaries might be readily traced and the requisite notice thereby given, the omission would invalidate the location.[7] In this case the importance of boundary stakes as *actual notice* is insisted upon with special reference to such an emergency as a misdescription in the location certificate or an error in the record, for the reason, as is inferrable from the language of the decision, that the staking, if done so as to clearly define the boundaries, will serve as *actual* notice and thus cure the defective *constructive* notice by the record.[8] But where there was a conflict between the boundaries as described in the record, and those which had been erected on the ground, it was held that parol evidence was not admissible to contradict the record after the visible monuments had been removed.[9] However, parol evidence has been accepted to prove what was meant by the word "north" as used in the description.[10] Where, in an action of trespass, defendants owned adjoining claims, lying west of plaintiff's ground, and the north line of plaintiff's claim was agreed to, and it was also agreed that their east and west lines were parallel, but the parties disagreed as to the location of these lines, and it was shown that W. owned claims adjoining plaintiffs' on the east, and that H. owned claims adjoining W. on the east, evidence of the west line of H. was held not pertinent, unless it was shown that *the east line* of W. and the west line of H. *were coincident.*[11] Where adjoining claimants agree

upon their boundaries, owners and subsequent purchasers, with notice, are estopped from disputing their correctness as agreed upon.[12] But the doctrine of estoppel as to boundaries will probably only apply as in cases of estoppel *in pais* generally.[13] When one of the boundaries given is another claim, it does not follow that the claim referred to is of the same extent, or that it lies in the same direction as the one described.[14] Where corner "posts" are required by statute to define the boundaries, there seems no objection to any other kind of monument of an equally permanent nature which will serve the purpose—as a stump.[15]

1 Rev. Stat. U. S., § 2324, *ante*, p. 16.
2 North Noonday M. Co. vs. Orient M. Co., 9 Rep. 601 (U. S. Cir. Ct., Dist. Cal., March 4, 1880).
3 See *post*, Ch. XV.
4 Holland vs. Mount Auburn, &c. Co., 53 Cal. 149.
5 Myers vs. Spooner, 55 Cal. 257.
6 *Post*, Ch. XV., "Colorado."
7 Pollard vs. Shively, 1 Col. Law Rep. 230 (citing Finley vs. Williams, 9 Cranch. 168).
8 *Ibid.*
9 *Ibid.*
10 Jenny Lind Co. vs. Bower, 11 Cal. 194.
11 Stokes vs. Monroe, 36 Cal. 383.
12 McGee vs. Stone, 9 Cal. 600.
13 *Ante*, § 65.
14 Lone Yankee Co. vs. Oregon Co., 7 Cal. 40.
15 Pollard vs. Shively, 1 Col. Law Rep. 230.

§ 147. **Limitation of Actions.** — The time within which actions may be brought affecting the right of possession of mining claims on the public domain, is fixed entirely by local statutes, and where such limitation applies expressly to mining claims, will be found in the compilation of local statutes.[1] Otherwise, the limitation of actions affecting real estate will apply.[2] Whatever time may be fixed by statute, the right to hold under its

provisions must depend upon the adverse possession by the party or his grantors who claims the benefits of such time.[3] Where the statute is pleaded by one tenant in common against his co-tenant, the rule that the possession of one of several tenants in common is the possession of all, applies, and in order to render the statute available it must appear not only that possession by one was for the statutory time,[4] but that it was claimed *adversely* to the co-tenant for the entire period.[5] The intent to h ld adversely must be indicated by acts calculated to exclude the co-tenant.[6] Adverse possession, which is only constructive possession under color of title, cannot be shown where the deed was made in pursuance of an involuntary sale under a void judgment.[7] The doctrine has elsewhere been noticed that mere adverse possession for the statutory period, of unpatented lands, will not avail as against a patent regularly issued.[8] To take advantage of the statute, it must be pleaded. In the absence of such plea, an instruction based upon the hypothesis of adverse possession is unwarranted.[9]

1 *Post*, Ch. XV.
2 *Infra*, § 153.
3 *Ibid.*
4 Two Years in Nevada.
5 Mining Co. vs. Taylor, 100 U. S. 37; 420 M. Co. vs. Bullion M. ., 3 Sawyer, 634; *s. c.*, 9 Nev. 240.
Coleman vs. Clements, 23 Cal. 245; Adams vs. Burke, 3 Sawyer,
King vs. Randlett, 33 Cal. 318.
Ante, § 67. See also Weeks on Mineral Lands, § 82, and cases d.
Maine Boys T. Co. vs. Boston T. Co., 37 Cal. 40.

148. Easements and Drainage.—The local jurisdiction, delegated by acts of Congress to the states and *ories, over the subject* of easements[1] and water [2] *has been noticed* elsewhere,[3] and the law gov-

erning water rights on the public domain given as fully as practicable.[4] An *easement* is defined to be "a liberty, privilege, or advantage which one man may have in the lands of another without profit. It may arise by deed or prescription."[5] Confining the definition to rights such as arise "by deed or prescription," those here considered could not be characterized as easements, but as statutory reservations, so far as they arise from conditions imposed prior to patent. When they are reserved in the patent they answer the description of easements reserved in the deed. Except as respects *water rights*, the only provision made in the act of Congress authorizing easements is that they shall be reserved in patents to mines as a condition of sale of such mines. But local legislatures have imposed certain conditions, favorable to the development of mines, upon the possession and enjoyment of public lands for other purposes. As in California, upon those occupying public lands for agricultural or grazing purposes, that it should be so occupied subject to the rights of miners to enter for mining purposes.[6] This gave the miner the right to extract mineral from lands so occupied, in the most practicable manner, with the least injury to the rights of the prior occupant.[7] But this statute was somewhat strictly construed, for the reason that it authorized what otherwise would be a trespass. It was therefore held that its application could not be extended by implication to lands occupied for other than grazing or agricultural purposes.[8] The appropriation of public land was held to give the occupant a private right, to infringe which was to deprive him of private property.[9] When, therefore, a miner entered land in the possession of another, he was required, in order to justify such entry, to show affirmatively (1) that public land; (2) that it contained minerals; (3) entered *bona fide* for the purpose of mining.[10] It

was so held, notwithstanding prior decisions, that the lands in a mineral region were to be presumed public until the contrary was shown.[11] This right to enter upon public land in possession of another was also guarded by provisions requiring the miner to give bonds to the prior appropriators against the injury of crops, etc., by the mining operations carried on.[12] But an offer of sufficient bonds, which were captiously refused by the prior agricultural occupant was held to entitle the miner to proceed, but did not release him from the obligation to pay all damages to crops which might be the proximate result of his mining.[13] The miner is not authorized to interfere with the right of the agricultural occupant to irrigate because it injures adjoining mining claims.[14]

1 Rev. Stat. U. S., § 2338, *ante*, pp. 23-4.
2 Rev. Stat. U. S., § 2339, *ante*, p. 24.
3 *Ante*, Ch. VIII.
4 *Ante*, § 51 *et seq.*
5 Bouvier's Law Dict.
6 Act of April 25, 1855.
7 McClintock vs. Bryden, 5 Cal. 97; Clark vs. Duval, 15 Cal. 85.
8 Fitzgerald vs. Urton, 5 Cal. 308; Burdge vs. Underwood, 6 Cal. 45; Weimer vs. Lowery, 11 Cal. 104.
9 Tartar vs. Spring Creek, &c. Co., 5 Cal. 396; Stokes vs. Barrett, 5 Cal. 36.
10 Lentz vs. Victor, 17 Cal. 271.
11 Smith vs. Doe, 15 Cal. 100; Burdge vs. Smith, 14 Cal. 380.
12 Ser. Local Stat., Ch. XV.
13 Rupley vs. Welch, 23 Cal. 452; Wixon vs. Bear River &c. Co., 24 Cal. 367.
14 Gibson vs. Puchto, 33 Cal. 310.

§ 149. **Same—Town Lots.**—Where a lot in a mining camp was occupied for a hotel, or for a dwelling house or corral, these uses were held not inconsistent with the policy of the state, in encouraging the development of mines, and therefore their possessory rights would be protected against miners sluicing, etc., within their in-

closures.[1] But such protection would not be suffered to operate as a cover beneath which a large tract of twelve acres could be taken up in a mining camp and held so as to prevent mining, where it did not obstruct the comfortable use of the lot as a residence, or for mechanical or commercial business.[2]

[1] Fitzgerald vs. Urton, 5 Cal. 308; Burdge vs. Underwood, 6 Cal. 45.

[2] Martin vs. Browner, 11 Cal. 12.

§ 150. Same—Drainage—Ditches—Right of way—Dumps—Tailings.—The most prominent subjects upon which local legislatures have made laws for the working of mines, involving such rights as are here classed under the head of easements, are those of drainage, ditches, rights of way, dumps, and tailings. Some of these statutes are of such doubtful constitutionality as never to have come into actual operation, so as to meet the test of a judicial decision.[1] Others have been held unconstitutional.[2] The subject of drainage and ditches is protected by the provisions of the federal statute,[3] in so far as it recognizes acquired rights of way for ditches, etc., for mining purposes. But the laws regarding drainage are local.[4] Except where it is authorized by statute, the locator of a mining claim has no right to build flumes or other structures on a subsequent location.[5] Nor has he, without such statutory reservation, any right by virtue of the priority of his location to use a subsequent claim as a dump for his waste, or a place of deposit for his tailings.[6] Nor have the prior locators any right to allow tailings to run free in the gulch and render valueless the claims of subsequent locators who may be situated below. And a custom of "free tailings," which allowed the destruction of junior claims in this manner, was held an unreasonable custom.[7] But the owner of a prior

claim may erect a dam when it is necessary to the prosecution of his work, in the manner which he elects as the best, although as a consequence a subsequent claim is flooded.[8] The California statute of 1870,[9] providing for the condemnation of a right of way over other mining claims, has been held only cumulative to a right already existing under local customs which it did not abrogate, and that injunction would lie to prevent interference with such right.[10] The provisions of the federal statute are not construed so as to grant any new rights or easements, but only to confirm such as were in existence prior to the passage of the act.[11] In construing the fifth subdivision of Section 1238 of the California code,[12] which section provides for the condemnation and taking of private property for enumerated public uses, among others, "tunnels, ditches, flumes, pipes, and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines," it was held that notwithstanding the legislative declaration of the public character of the use for which the appropriation was authorized, such declaration would not be conclusive upon the courts, where it was clear that the object sought was the appropriation of private property to the private use of any one other than the owner. In this case the plaintiffs sought to procure, by condemnation, certain lands belonging to the defendants to serve as a site for a bed-rock flume to carry the dirt and gravel from its mining claims, and also as a place of deposit for the tailings and refuse matter from its claims. The court held that there was an entire absence of any public interest in the purposes for which the land was sought to be condemned, and held the subdivision unconstitutional.[13] It has been held under district rules that a miner might appropriate a place of deposit for pay dirt and *tailings*; that these were property, and

entitled to protection as such; but when tailings were allowed to flow free, it was conclusive evidence of abandonment of all property in them, unless the peculiarities of the place rendered no artificial means for their confinement necessary. And when tailings were allowed free flowage on to the land of another, they became his property.[14]

1 *Post*, Ch. XV., "Colorado."
2 Consolidated, &c. Co. vs. Central, &c. R. Co., 51 Cal. 269.
3 Rev. Stat. U. S., § 2339, *ante*, p. 24.
4 See Ch. XV.
5 Esmond vs. Chew, 15 Cal. 137; Harvey vs. Ryan, 42 Cal. 626.
6 Gregory vs. Harris, 43 Cal. 38; Nelson vs. O'Neal, 1 Mont. 284.
7 Lincoln vs. Rodgers, 1 Mont. 217.
8 Stone vs. Bumps, 46 Cal. 218.
9 *Ante.*
10 Bliss vs. Kingdom, 46 Cal. 651.
11 Titcomb vs. Kirk, 51 Cal. 288; Basey vs. Gallagher, 20 Wall. 670; Jennison vs. Kirk, 98 U. S. 453.
12 *Post*, Ch. XV.
13 Consolidated, &c. Co. vs. Central Pacific R. Co., 51 Cal. 269.
14 Jones vs. Jackson, 9 Cal. 237.

§ 151. **Tenancy in common.**—The rights which may be acquired in mining claims on the public domain may be held in common by several locators or purchasers, with all the incidents that usually accompany such tenancies, in addition to the statutory provision for contribution of annual expenditures.[1] Prior to this statute the right of one co-tenant was such that a mere failure to contribute would not *ipso facto* work a forfeiture of his interest. It was held that some appropriate action should be taken to liquidate the demand against him. His mere passive acquiescence in a sale of his interest was not sufficient to divest his rights. The right to a mining claim being fixed by the law of property, could not be divested by local district rules.[2] There must not only be

a forfeiture of such interest, but some one capable of taking it must be in a position to assert a right to it, even where the forfeiture is claimed for failure to comply with conditions fixed by contract. It was accordingly held that the co-tenants of the delinquent party could not in the company's name, take and hold his interest by forfeiture.[3] Anything required to hold the claim under the original location, being done by one tenant, inured to the benefit of his co-tenants.[4] The possession of one tenant in common is the possession of all.[5] They may sue jointly for the recovery of all their several undivided interests.[6] Or they may sue and recover separately, each for his own interest.[7] But one of the tenants in common, suing in a possessory action against one who has no right or title whatever, may recover possession of the whole.[8] This doctrine, as laid down in earlier California cases, has been questioned;[9] but it seems to be still adhered to in that state, and is well grounded in principle, as any possessory claim by a mere trespasser is an infringement of the rights of each one of the tenants in common, and the rights of those with and for whom he holds. By the act of locating in the names of several persons, whether they consent or not, they become tenants in common.[10] Though an interest in a mining claim may only be properly conveyed under state laws by deed, yet the doctrine of abandonment applies so that a co-tenant may be admitted by the locator, and the person to whom the interest is abandoned will hold it by the same right which he could have acquired to the entire claim had the whole been abandoned by the original locator. And having acquired this interest, it cannot be divested without his consent. In case of a sale of the entire claim by the original locator, the co-tenant may ratify the sale and recover his portion of the proceeds, or he may elect to sue in ejectment for the recov-

ery of his interest in the claim.[11] Beyond the provisions for contribution to the annual expenditure, one or several tenants in common cannot compel an unwilling co-tenant to join in developing or working the claim. The California statute of 1865–6,[12] authorizing the levy of assessments by co-tenants for such purposes, was only intended to apply to those between whom the partnership relation existed.[13] One tenant in common may maintain an action against his co-tenants for a denial of his right.[14] But it has been held that where one of several joint owners of a flume consented to its overflow, his co-owners could not recover for the consequential damage resulting from such overflow.[15] It has been held that partition between co-tenants would be decreed as in other estates of inheritance, where the claim was held by possessory right;[16] though actual division of the claim would in general be impracticable, in which event a sale and division of the proceeds would necessarily follow.[17] The federal courts, in the exercise of equity jurisdiction, have refused to follow the state statutes in this particular, but adhere to the equity rules and precedents, and decline to decree partition unless the petitioner has *title* to a portion of the premises.[18] A tenant in common is entitled to an accounting for the proceeds of the mine from his co-tenants.[19]

1 Rev. Stat. U. S., § 2324, *ante*, p. 15–16.

2 Waring vs. Crow, 11 Cal. 366; Dutch Flat, &c. Co. vs. Mooney, 12 Cal. 534.

3 Wiseman vs. McNulty, 25 Cal. 230.

4 Strong vs. Ryan, 46 Cal. 33.

5 Mining Co. vs. Taylor, 100 U. S. 37; Mallet vs. Uncle Sam, &c. Co., 1 Nev. 188; Patterson vs. Keystone M. Co., 30 Cal. 360.

6 Goller vs. Fett, 30 Cal. 481.

7 Morenhaut vs. Wilson, 52 Cal. 263; Gelcich vs. Moriarity, 53 Cal. 217.

8 Melton vs. Lombard, 51 Cal. 258, 175.

I. Co. vs. Crœsus, &c. Co., 2 Nev. 168.

10 Chase vs. Savage, &c. Co., 2 Nev. 9; Gore vs. McBrayer, 18 Cal. 582; Henderson vs. Allen, 23 Cal. 519.

11 Murley vs. Ennis, 2 Col. 300.

12 *Post*, Ch. XV., § 193.

13 Brundage vs. Adams, 41 Cal. 619.

14 Gore vs. McBrayer, 18 Cal. 582.

15 Crary vs. Campbell, 24 Cal. 634.

16 Hughes vs. Devlin, 23 Cal. 501.

17 McGillioray vs. Evans, 27 Cal. 92; Lenfers vs. Henke, 73 Ill. 405; Conant vs. Smith, 1 Aik. (Vt.) 67; Dall vs. Confidence M. Co., 3 Nev. 531; Adams vs. Briggs Iron Co., 7 Cush. 361.

18 Strettell vs. Ballou, 2 Col. Law Rep. 122.

19 Kahn vs. Central S. Co., 11 Rep. 249 (Sup. Ct. U. S., Jan., 1881).

§ 151*a*. **Mining partnership.**—Where two or more persons own a mine jointly, or as tenants in common, there may arise between them, without special contract for that purpose, the relation of partners. This occurs where they enter into an agreement to work the property for their mutual benefit, and do work it, contributing to the expense and sharing the profits according to the interest owned by each.[1] This kind of partnership has some incidental rights and liabilities peculiar to itself, though they are governed by the ordinary rules applicable to partnerships, except as those rules are varied by the general usage. Each partner may transfer his interest and avoid incurring future liability without dissolving the partnership.[2] Neither of the partners can bind his copartner by a promissory note or contract of indebtednesss without special authority, which it is incumbent on the holder or creditor to show.[3] But the law presumes that each partner has authority to employ laborers and render the firm liable for the wages of employes. Nevertheless, where there is an express agreement among the partners that all such contracts to be binding must be ratified by all, and the employe has notice of such agreement, he cannot recover in the absence of such ratification.[4] In case of sale by one partner of his interest, it

has been held that another member of the concern may have a lien upon the partnership property for moneys advanced beyond his proportion, and notice of such lien is imputed to one who purchases while the partnership operations are in progress.[5] But the retiring partner parts with his equity to have the assets of the firm, applied to the payment of partnership debts, before the individual members can be called upon.[6] The purchaser of an interest in the property being worked in partnership, by the purchase becomes a partner, with all the rights and liabilities belonging to the relation.[7] Those owning the majority of interest in the property have in general the right to control the manner of working the same, provided that the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all. In case of manifest oppression, the minority in interest may obtain relief from a court of equity.[8] But there can be no controlling interest which will serve to force the minority into the partnership relation.[9] What are commonly known as "grub stake" contracts have been held to create a mining partnership with respect to the work of prospecting and location; but the rights and liabilities thus acquired and imposed were held not to be governed strictly by the law of commercial partnerships.[10] But to give the furnisher of supplies an interest in the mines discovered, the relation must be a subsisting one at the time of discovery. If the prospector has abandoned his contract and entered into similar arrangements with another, the original furnisher will be entitled to no interest in the mines discovered.[11] However, the main difference lies in the absence of the rule of *delectus personæ*, as applied to strict partnerships. Upon this depends the right of a surviving partner to control the in-

of decedent; the effect of a transfer of interest by

ie members to dissolve the partnership, and cer-

tain equities which a retiring partner may have as to the appropriation of assets to the payment of partnership debts. These incidents do not belong to mining partnerships.[12] There is nothing to prevent the forming of a strict commercial partnership in working and developing mines if the parties are so agreed, and hold themselves out to the world as such partners, in which event the business and the relative rights and liabilities of the partners would be governed in all respects as though they were engaged in any other business with the same community of interest.[13] The commercial partnership would probably be the necessary consequence of the ownership of the mine by a partnership, as such; but in general the property is owned by the copartners as tenants in common, and the partnership relation exists between them only as respects the working and development of the property and the profits of such work. Each member holds his interest in his own right. The partnership concern can not acquire any additional property for him, nor impose any conditions upon his disposition or acquisition of interests. Their allegiance to the association is confined to the business—the work in which they are engaged.[14] As a consequence, when either of the partners contracts with a copartner to purchase an additional interest, it only affects the company as it enlarges his interest in the proceeds of the business and increases his liabilities. There is no presumption arising from the obligation imposed upon the purchaser by virtue of the relation of partnership, that he acts for his associates.[15] But where one of the partners is empowered and authorized to purchase other property as the agent of the partnership, and he undertakes to act in that capacity, a purchase in his own name would impose a trust upon him in favor of his principal.[16]

1 Duryea vs. Burt, 28 Cal. 569; Skilman vs. Lachman, 23 Cal. 198.
2 *Skilman vs. Lachman, 23 Cal.* 198; Dougherty vs. Cleary, 30 Cal.

290; Kahn vs. Central Smelting Co., 11 Reporter, 249 (Supreme Court United States, January, 1881.)

3 Skilman vs. Lachman, *supra;* Jones vs. Clark, 42 Cal. 180.

4 Nolan vs. Lovelock, 1 Mont. 224; Taylor vs. Castle, 42 Cal. 367.

5 Duryea vs. Burt, 28 Cal. 569.

6 Jones vs. Clark, 42 Cal. 180.

7 Taylor vs. Castle, 42 Cal. 367.

8 Dougherty vs. Creary, 30 Cal. 290.

9 *Supra*, § 151.

10 Boucher vs. Mulvehill, 1 Mont. 306; Settembre vs. Putnam, 30 Cal. 490.

11 Johnston vs. Robinson, 2 Col. Law Rep. 110.

12 Jones vs. Clark, 42 Cal. 180; Taylor vs. Castle, 42 Cal. 367.

13 Decker vs. Howell, 42 Cal. 636.

14 First National Bank vs. Bissell, 1 Col. Law Rep. 158.

15 *Ibid.*

16 Settembre vs. Putnam, 30 Cal. 490.

§ 152. **Corporations.**—There is very little, if anything, respecting mining corporations, to distinguish their legal status, from that of corporations organized for other purposes. The rights and liabilities of members are distinguished from those of co-tenants and partners by the same rules that obtain respecting other business corporations except as they are varied by statute. It has been held that a contract with all the stockholders by which they agree to assign their stock to a trustee is the same as a contract with the corporation.[1] Also, that where the legitimate expenses exceed the amount authorized by the by-laws, assessments may be levied upon the stock for the payment of the same.[2] Where the statute, charter or by-laws prescribe certain methods of transacting the business of mining corporations, those methods must be substantially followed in order to render the acts valid and legal.[3] But where the by-laws were adopted by the stockholders instead of the directors, and were duly recorded in the company's books and acted on and recognized for more than ten years, they were held to be regular by-laws of the company.[4] And where

the corporation was reduced to three members, a failure to ballot for officers at their meetings was held not to invalidate their informal election of officers.[5] It has also been held that the correctness of minutes of corporate meetings, may be impeached by parol evidence on behalf of the corporation.[6]

1 Gordon v. Swan, 43 Cal. 564.
2 Sullivan v. Triunfo, &c. Co. 29 Cal. 585.
3 State v. Curtis, 9 Nev. 325; State v. Pettineli, 10 Nev. 141; State v. Wright, 10 Nev. 167.
4 State v. Curtis, 9 Nev. 325.
5 Vermont, &c. Co. v. Windham bank, 44 Vt. 489.
6 Gilson, &c. Co. v. Gilson, 51 Cal. 341.

§ 153. **Mining claims—Real estate.**—The interest which the miner obtains by possession and location in public mineral lands is generally regarded as real estate.[1] It has been held to be an estate of inheritance, subject to the laws of descent as other real property, and to partition between co-tenants, whether they hold as tenants in common, co-purchasers or partners.[2] And a suit, involving possessory title, held to raise "a question of title to real property in fee," and so not subject to arbitration.[3] But the federal courts will not decree partition between mining claimants unless the bill be filed by one having title. In proceedings of this kind the jurisdiction is equitable, and therefore not governed by state statutes, but the practice follows the equity rules and precedents. Where partition is authorized by state statutes, the suit must be in the state courts.[4] Mining claims have also been treated as real estate in determining questions of jurisdiction, and fixing the venue in actions involving the possessory right.[5] The buildings and structures erected on the claim become *fixtures* and pass with the freehold, precisely as in case of permanent improvements on other real property. An engine and boilers

have been held to be such fixtures, which could only be removed while the tenant was in possession.[6] But where the owner of a mine purchases a water ditch, with a view to use the water ditch in connection with the working of his mine, and the purchase includes "the water-rights thereto appertaining," such purchase does not necessarily constitute the ditch an appurtenance of the mine.[7] Mere trade fixtures, though fixed to the soil may be removed without the consent of the owner. An example given is that of *pans* furnished to a mill owner upon his agreement to pay rent therefor.[8] But these fixtures should be removed, when placed upon mines by a lessee during his tenancy.[9] A chattel mortgage on an engine and boiler given to secure the purchase money has been held a prior lien over a previous mortgage on the realty.[10]

1 Harris v. Equator, &c. Co., 2 Col. Law Rep. 63.
2 Hughes v. Devlin, 23 Cal. 501; Forbes v. Gracey, 94 U. S. 762.
3 Spencer v. Winselman, 42 Cal. 479.
4 Strettell v. Ballou, 2 Col. Law Rep. 122.
5 Van Etten v. Jilson, 6 Cal. 19; Watts v. White, 13 Cal. 321.
6 Merritt v. Judd, 14 Cal. 59; Miller v. Dale, 44 Cal. 562; Treadway v. Sharon, 7 Nev. 37.
7 Quirk v. Folk, 47 Cal. 453.
8 Prescott v. Wells, Fargo & Co., 3 Nev. 82.
9 Hayes v. New York, &c. Co., 2 Col. 273.
10 Tibbitts v. Moore, 23 Cal. 208.

§ 154. **Conveyance of mining claims.**—Where claims are held by right of possession, in the absence of a local statute prescribing the mode of their transfer, it has been held sufficient to pass the right to a successor, that a simple agreement be made to that effect, and the possession is delivered to the transferee, and a bill of sale will be competent evidence.[1] But a bill of sale not under seal [illegible] not convey the legal title where it merely purpor[illegible]ey the present interest of the seller. It mere-

ly conveyed an equitable interest which would be held subject to the rights of the holders of the legal title or a superior equity. The transferee would only take such rights as the vendor had, and could not occupy the position of a *bona fide* purchaser. The doctrine of *caveat emptor* was held to apply in all such cases.[2] A sale by one in possession, entirely by parol and the delivery of possession, was held equally as good as though evidenced by bill of sale.[3] And such a sale and delivery will cut off a subsequent purchaser for value who receives a deed regularly acknowledged. Possession by the first purchaser is notice to the latter, although the claim is not enclosed.[4] But this rule allowing a verbal sale was held only to apply where the vendor was in possession, and could deliver possession to his vendee. Where another party held adversely the conveyance was required to be in writing.[5] And where the conveyance was by bill of sale, that was held the best evidence of the transfer, and excluded parol evidence, subject to the usual exceptions in such cases.[6] But where the conveyance was simply by a bill of sale not under seal that was held sufficient.[7] Where the occupant quit the possession and expressed the wish that another should succeed, it was held to be a gift and no abandonment, if the wish were communicated.[8] By statute of April 13, 1860, the rule of verbal sales was abrogated in California. The provision that mining claims *might* be made by bill of sale, was construed as mandatory. But this statute did not apply to gold mines, until the section excepting them was subsequently repealed.[9] However, it was held in the same case in which the mandatory construction was given to the statute, that a bill of sale executed by one verbally authorized was sufficient.[10] The statute requiring conveyances of mining claims to be in writing, is liberally construed. No form of words is necessary in a bill of

sale. It will be so construed as to effectuate the intention of the vendor. It will not be held void for uncertainty of description where the points named may be well-known monuments. Nor is it void because it is a voluntary gift.[11] The interest of a mortgagor, who retains possession until forfeiture, may be conveyed by him, or sold under attachment or execution against him.[12] But one receiving a bill of sale of mining property, not under seal, which only purported to convey the interest of the vendor, took subject to all the infirmities of the vendor's title.[13] A conveyance by sheriff's deed of a mining claim sold under execution must recite the judgment on which the execution was issued, otherwise it will be void.[14] And the judgment and execution are facts necessary for one tracing his title through a sheriff's deed, to establish on the trial.[15] Miners' *Title Bonds*, taken without a valuable consideration expressed in the instrument, by which the grantee or obligee (if he may be called either) obtains an option to purchase at a stated price, is void for the want of consideration and mutuality. The only title bonds which will be held valid and binding on either party are such as contain an unconditional promise to purchase, or where there is a consideration paid in money or work on the claim for the option.[16]

1 Jackson vs. Feather River, &c. Co., 14 Cal. 18; Blodgett vs. Potosi, &c. Co., 34 Cal. 227; Draper vs. Douglas, 23 Cal. 347.

2 Clark vs. McElroy, 11 Cal. 155 (citing Adams vs. Cuddy, 13 Pick. 463; Morse vs. Godfrey, 3 Story, 364; Dupont vs. Wertheman, 10 Cal. 354); Waring vs. Crow, 11 Cal. 366.

3 Gore vs. McBrayer, 18 Cal. 582; Table Mountain, &c. Co. vs. Stranahan, 20 Cal. 198, *s. c.*, 21 Cal. 548; Gatewood vs. McLaughlin, 23 Cal. 178; Antoine Co. vs. Ridge Co., 23 Cal. 219; Mining Co. vs. Taylor, 100 U. S. 37.

4 Patterson vs. Keystone M. Co., 23 Cal. 575.

5 Copper Hill M. Co. vs. Spencer, 25 Cal. 18.

apbell, 24 Cal. 634.

dd, 26 Cal. 263.

8 Richardson vs. McNulty, 24 Cal. 339.

9 Cal. Stat. 1863, p. 98.

10 Patterson vs. Keystone M. Co., 30 Cal. 360; Hardinburgh vs. Bacon, 33 Cal. 356; Felger vs. Coward, 35 Cal. 650; Milton vs. Lombard, 51 Cal. 258.

11 Myers vs. Farquharson, 46 Cal. 190.

12 Halsey vs. Martin, 22 Cal. 645.

13 Clark vs. McElroy, 11 Cal. 155 (citing Adams vs. Cuddy, 13 Pick. 463; Morse vs. Godfrey, 3 Story, 364; Dupont vs. Wertheman, 10 Cal. 354).

14 Wiseman vs. McNulty, 25 Cal. 230.

15 Quirk vs. Folk, 47 Cal. 453.

16 Smith vs. Reynolds, 1 Col. Law Rep. 89, see. *infra* § 155 *contracts.*

§ 155. **Mining contracts.**—The law of contracts applies alike to mining as to other branches of business; but there are contracts entered into in this behalf that are somewhat peculiar in their operation. As, for example, contracts to convey, which are conditioned only upon the option of the purchaser to buy for a stated price, within a given time, without further consideration expressed in the bond. These bonds, or contracts, are in contemplation of law nothing more than open proposals, which may be withdrawn by the seller at any time before they are fully accepted, and the purchase price tendered by the purchaser. They are not binding upon either without a valuable consideration, or covenants which bind both parties to consummate the bargain.[1] The payment of a forfeit in money or labor does not bind the purchaser to pay the balance. The forfeit is only the consideration which he pays for the option.[2] Another kind of contract which figures conspicuously in mining enterprises, is the agreement to prospect for mines, to be located on joint account. Mines discovered by a prospector while such an agreement is in force makes the parties tenants in common of mines so discovered, and entitles each to the interest agreed upon.[3] But if the

contract has been abandoned by the prospector, and a new one entered into with another, the deserted partner has no interest in the mines discovered under the new contract.[4] And such contracts may be specifically enforced against the active party to the agreement who locates in his own name.[5] A contract by several to purchase jointly an interest in a mine, is for the benefit of all, and if one party takes the title in his own name, he may be compelled to convey to the others.[6] Contracts by mining partnerships have been sustained, in the absence of a by-law authorizing them, where the contract was consistent with the general usages of the company.[7] The general doctrine of *agency* applies to miners' contracts. But a superintendent has no authority by virtue of his employment to borrow money on the credit of his principal.[8]

1 Smith vs. Reynolds, 1 Col. Law Rep. 89 (U. S. Cir. Ct. Dist. Col.).
2 Gordon vs. Swan, 43 Cal. 564; North Georgia M. Co. vs. Latimer, 51 Ga. 67; Luckhart vs. Ogden, 30 Cal. 547.
3 Henderson vs. Allen, 23 Cal. 519.
4 Johnstone vs. Robinson, 2 Col. Law Rep. 110.
5 Sears vs. Collins, 1 Col. Law Rep. 489 (Sup. Ct. Col., April term, 1881); Welland vs. Huber, 8 Nev. 203.
6 First Nat'l Bank vs. Bissel, 1 Col. Law Rep. 158 (U. S. Cir. Ct. Col.).
7 Taylor vs. Castle, 42 Cal. 367.
8 Breed vs. First Nat'l Bank, 4 Col. 481.

§ 156. **Miners' liens.**—One of the most important local statutory provisions which is specially recognized by the law of Congress, is that giving liens upon mines for labor performed thereon.[1] It has been decided under the Nevada statute that the foreman of a mine had a lien on the property for his salary.[2] And in California, for cutting cord-wood for use at the mine, it not being denied ...e labor was done on the mine.[3] The Nevada ...as also construed to give a laborer a lien on a

quartz mill for his services in hauling quartz to the mill.[4] A *ditch*, though connected at different points by *flumes*, was held to be an excavation throughout, and not a superstructure, within the miners' lien act.[5] But it seems subsequently to have been held in doubt whether or not a flume was a superstructure.[6] One of several mining partners may have a lien upon the mine for money paid for working the same in excess of his proportion; also for debts due creditors, and one purchasing an interest during the progress of the work was held to be charged with notice of such lien.[7] In Montana it has been held that an agent or superintendent employed to oversee the erection of buildings and the working of a mine was not entitled to a miner's or mechanic's lien for the payment of the monthly salary agreed upon.[8] But that a superintendent whose traveling and living expenses were agreed to be borne by the joint property and business, held a lien upon such property and business, to which he must resort for reimbursement of his expenses before individual liability would attach.[9] The miner cannot in general have one lien for work done on separate parcels of property, as for work done on a quartz *mill* and work done on a quartz *mine*, though the work was done upon both under the same contract.[10] But where miners were employed in developing a mine, and a portion of the work was performed by contract at so much per foot, and a portion by contract at so much per day, it was held under the Nevada statute that they were not required to file separate liens for the work done by the foot and that done by the day, but that each could file his lien as for one continuous employment, and the time would not begin to run within which they must be filed until the last work was performed.[11] But when the work has been completed on a quartz mill, by a party employed to build it, the mechanic's lien cannot be kept

alive by occasional repairs subsequently contracted for.[12] In general the lien law is not retroactive in its operations where it would affect the vested rights of third parties. As, where a lien was claimed under the California statute of April 30, 1868, and a mortgage was executed and recorded prior to the commencement of the work, it was held that the statute was not intended to give priority to the lien over the prior mortgage.[13] It was also held under the Nevada statute that one employed at so much per day, payable monthly, would hold his lien subject to a subsequent mortgage from the end of the current month within which the mortgage was recorded.[14] Where the act was passed February 6, 1867, it was held that a lien could only be held for work done subsequent to the date of its passage, and that an ordinary judgment should be entered for the work previously done.[15] But it has been held that statutes giving liens may be retroactive where they do not affect the vested rights of third parties.[16] And where there is a portion of the work to which the lien will not attach, the miner in appropriating payments, even after the work is completed, may credit the moneys received to that portion of the work for which he holds no lien.[17] And an intermediate mortgagee will have no right to object to such appropriation.[18] The lien law of Nevada is liberally construed by the courts, so as to give the miner and mechanic the full benefit of its provisions.[19] The California act of 1868 was held not to violate the constitutional provision that "All laws of a general nature shall have a uniform operation," merely because it failed to give laborers, other than those working on mines, a lien for their compensation.[20] The *complaint* of a party suing to enforce a lien must state facts sufficient to show a contract, on which he seeks to re-
[illegible]or,[21] But the description in the complaint was held
[illegible]t where it called for a large building on certain

designated lots, together with a convenient space of land around the same.[22] A description substantially similar in the lien was held sufficient; though the decree should properly define the extent of land to be included in the lien.[23] The following additional points have been decided in Nevada: (1) Mechanics' liens are assignable and may be enforced in the name of the assignee, by an assignment of the paper called the mechanics' lien, which being an evidence of indebtedness, is an assignment of the debt as well as the lien; (2) that the words "for value and in consideration of one dollar in hand paid by Wm. Skyrme, the receipt whereof is hereby acknowledged, I do sell, assign, transfer and set over to said Wm. Skyrme the within lien and all my rights thereunder," were broad enough to include the debt; (3) that by the repeal of the law of 1861,[24] by the act of 1871,[25] liens which attached under the earlier statute or the right to enforce them were not lost, as the new law contained all the substantial provisions of the old; (4) there could be no joint liens without joint interest; (5) that the acceptance and transfer of a note was no abandonment of the lien; (6) that the notice of lien was sufficient where it recited that it was to secure the performance of a contract to pay the money specified in a certain note, given in settlement according to agreement for labor performed, as a miner in extracting ore and working in a certain designated mine, for a specified time, although it would have been better to state accurately the character of work and by whom and for whom done.[26] It was also decided under the Nevada act of 1861,[27] that the object of the statute was to have a formal suit to enforce the lien and by a publication of notice secure the appearance of lien claimants other than plaintiff, and so dispose of the entire matter of liens against the property in one proceeding; but that the failure of plaintiff in the action to

publish notice of his suit to foreclose would not deprive an intervening lien claimant of his right to have his claim adjudicated, nor would a dismissal by plaintiff cut off the rights of intervenors, after appearance by defendant,[28] recorders are authorized under the law of that state to administer the oath and certify to the verification required under the mechanics' lien law.[29] A prior judgment against the agent of owners is no defense to a suit to foreclose the lien.[30] It might be proper to add, in connection with the subject of liens, that *liens for taxes* on ore will lie against the possessory right to the mine, and it may be sold in satisfaction.[31]

1 Rev. Stat. U. S., § 2332, *ante*, p. 21.
2 Capron vs. Strout, 11 Nev. 304.
3 Bradbury vs. Cronise, 46 Cal. 287.
4 *In re* Hope M. Co., 1 Sawyer, 710.
5 Ellison vs. Jackson W. Co., 12 Cal. 543.
6 Head vs. Fordyce, 17 Cal. 149.
7 Duryea vs. Burt, 28 Cal. 569.
8 Smallhouse vs. Kentucky, &c. Co., 2 Mont. 443.
9 Isaacs vs. McAndrews, 1 Mont. 437.
10 Davis vs. Alvord, 94 U. S. 545 (reversing Alvord vs. Hendrie, 2 Mont. 115).
11 Skyrme vs. Occidental, &c. Co., 8 Nev. 219; Capron vs. Strout, 11 Nev. 304.
12 Davis vs. Alvord, 94 U. S. 545.
13 Preston vs. Sonora Lodge, 39 Cal. 116.
14 Capron vs. Strout, 11 Nev. 304.
15 Hunter vs. Savage, &c. Co., 4 Nev. 153.
16 Gordon vs. South Fork, &c. Co., 1 McAll. 513.
17 Hunter vs. Savage, &c. Co., 4 Nev. 153.
18 Capron vs. Strout, 11 Nev. 304.
19 Skyrme vs. Occidental, &c. Co., 8 Nev. 219.
20 Quale vs. Moon, 48 Cal. 479.
21 Nolan vs. Lovelock, 1 Mont. 224.
22 Dickson vs. Corbett, 11 Nev. 227.
23 Tibbetts vs. Moore, 23 Cal. 208.
[illegible]v. Stat. 1861, p. 35.
[illegible]Stat. 1871, p. 123.

[26] Skyrme vs. Occidental &c. Co., 8 Nev. 219; as to the effect of repeal of old law by new (3) *supra*; Capron vs. Strout, 11 Nev. 304.
[27] Nev. Stat. 1881, p. 36.
[28] Elliott vs. Ivers, 6 Nev. 287.
[29] Arrington vs. Wittenberg, 12 Nev. 99.
[30] Dickson vs. Corbett, 11 Nev. 277.
[31] Forbes vs. Gracey, 94 U. S. 762.

§ 157. **Taxation.**—There is no doubt of the right of states to provide for the taxation of mining, as other property where the mines belong to individuals, nor of the right of the states to tax minerals which have been removed from mines located on the public domain.[1] The authority of the states, however, to tax mines located on the public domain, has been seriously questioned; but it has been generally decided that where mining property is not exempt by the local law, the possessory right of the miner may be taxed as other property. It is not a taxation of the land, but merely of the proprietary right of the individual to possess and enjoy it.[2] I know of no decision of this question by the Supreme Court of the United States; though that court has decided that the possessory right was subject to a lien for taxes on the product of the mine.[3] Most, if not all the states of the mining region, have by their constitutions exempted mines from taxation.[4] It was held in California and Nevada no violation of the organic acts or the acts admitting those territories into the Union, inasmuch as the exemption contained therein was for the protection of the general government, and not of the individual.[5] In assessing taxes on the proceeds of mines the jurisdiction of the state (of Nevada), attaches while the tangible property is within the state; but if the right or interest in the property is a chose in action, the state has no jurisdiction over either the person or right, for the purpose of taxation.[6] The removal of the taxable property beyond the jurisdiction before the amount of tax is

specified or the mode of collection established, does not release the owner from liability for the tax.[7] The provision in the Nevada constitution for the taxation of the proceeds of mines, contemplates the taxation of the *entire* proceeds and not a fractional part thereof.[8] But there was nothing in the constitution, or in subsequent sections of the statute,[9] providing for *equality* of taxation, or uniformity of *manner* in enforcing collection, which is contrary to the provision requiring quarterly assessments and payments.[10] Flumes have been held subject to taxation, though necessary to give value to a claim which was exempt by state law.[11] Where mining claims are exempt from taxation, the exemption cannot be avoided by levying a tax on the money invested in them, under the provisions of a statute taxing "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever." The true basis of valuation in taxing the possessory right to mining claims, is the amount which can be realized by a sale of the right.[12] Where the statute[13] provided "that an additional exemption of fifteen dollars per ton, may be allowed on all ores worked by Freiburg or dry process," it was held not to authorize an exemption of fifteen dollars per ton on all ores so worked, in addition to the actual cost of working them, but only when such actual cost exceeded sixty per cent. of the gross yield. The object of the statute was to tax the gross yield less the actual cost, provided the actual cost did not exceed sixty per cent. in case of ores worked by wet process, with an additional fifteen dollars per ton in case of ores worked by dry process.[14]

[1] Forbes vs. Gracey, 94 U. S. 762; City of Virginia vs. Chollar Potosi M. Co., 2 Nev. 86; State vs. Eastabrook, 3 Nev. 173; State vs. Kruttschnitt, 4 Nev. 178; State vs. Manhattan, &c. Co., *id.* 319.

[2] State vs. Moore, 12 Cal. 56; Hale & Norcross, &c. Co. vs. Story County, 1 Nev. 104; People vs. Taylor, 1 Nev. 109; People vs.

Black Diamond, &c. Co., 37 Cal. 54; People vs. Shearer, 30 Cal. 645.

3 Forbes vs. Gracey, 94 U. S. 762.

4 Constitution Nev., Art. X; Constitution Col., Art. X., § 3.

5 People vs. Black Diamond, &c. Co., 37 Cal. 54; People vs. Taylor, 1 Nev. 109.

6 State vs. Earl, 1 Nev. 394; State vs. Eastabrook, 3 Nev. 173; State vs. Kruttschnitt, 4 Nev. 178.

7 City of Virginia vs. Chollar Potosi M. Co., *supra;* State vs. Eastabrook; State vs. Kruttschnitt, *supra.*

8 State vs. Eastabrook, *supra;* Little Pittsburgh, &c. Co. vs. Stanley, 2 Col. Law Rep. 81. [The latter case was one rising under the laws of Colorado, and was decided by Judge HELM of the district court on demurrer to an answer in an injunction proceeding to restrain the collection of taxes. In an able opinion the learned judge decided the following points: (1) That the net proceeds of mines were taxable (citing Art. 10, § 3, Const. and Gen. Laws, § 2244). (2) That it was not within the power of the legislature to exempt such property from taxation (citing Const, Art. 10, § 6). (3) That the language of the constitution—"All taxes shall be uniform * * * * and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation. * * * Provided that mines and mining claims bearing gold, silver and other precious metals (except the net proceeds and the surface improvements thereof) shall be exempt from taxation," clearly indicated that taxes on this property should be levied and collected under general laws, hence the constitution was not self-enforcing. (4) That the only general law for taxing personal property, provided that all personal property should be listed in the county "where it shall be on the first day of May of the then current year" (citing Gen. Laws, § 2248). (5) That this section was manifestly inapplicable to the taxation of the net proceeds of mines, if not unconstitutional, for the reason that it did not provide for taxation of the *entire* net proceeds of mines. (6) That the statute providing for the assessment of the average value of stocks of merchandise would not apply. (7) That the legislature had provided no machinery for the assessment and levy of taxes on the net proceeds of mines, and hence, such property was not taxable in the present state of the revenue law.]

9 Nev. Stat. 1865, p. 271; Nev. Stat. 1871, § 10, p. 87.

10 State vs. Kruttschnitt, *supra;* State vs. Eureka, &c. Co., 8 Nev. 15; State vs. Manhattan, &c. Co., *supra.*

11 Hart vs. Plum, 14 Cal. 148.

[12] State vs. Moore, 12 Cal. 56.
[13] Nev. Stat. 1871, p. 87.
[14] State vs. Eureka, &c. Co., 8 Nev. 15.

§ 158. Remedies and procedure—Trespass—Ejectment—Forcible entry, etc.—Injunction—Actions to quiet title.—The modes of procedure herein mentioned are so designated without reference to the abolishing of forms of action by the civil codes. They do not embrace every species of litigation which may arise respecting mining property, for the reason that controversies may grow out of mining transactions as endless in variety as from any other kind of business. These are the most common and characteristic.

Trespass, or its equivalent under code procedure, will lie in favor of any one in actual or constructive possession against one entering with no better title at the date of such entry.[1] It is only necessary for the party resorting to this remedy to prove an actual or constructive possession in himself, as against the trespasser.[2] But in actions of trespass the *constructive* possession of the entire lode by plaintiff must yield to defendant's prior *actual* possession of a part thereof, and as to that part defendant would not be a trespasser.[3] It has also been held that defendant in trespass may justify by showing title in a third party at date of entry, and a purchase by himself before suit.[4] An action of this kind will not in general lie where plaintiff is totally ousted from the possession which is held adversely by defendant.[5] But a trespass is not condoned by leaving the trespasser one month in undisturbed possession.[6] A party in possession of a ditch and the water incident thereto, may maintain an action against a trespasser when the legal title
a third person.[7] Where a joint trespass was de-
on in an action against several defendants, and
trial it was proved that there were several dis-

tinct trespasses committed by defendants, it was held that plaintiff was nevertheless entitled to recover.[8] Trespass will lie for underground encroachments on the *dip* of plaintiff's vein.[9]

Ejectment, or a civil action under the code, intended to serve the same purpose, lies to try the right of possession. In such actions, every question respecting compliance, with the conditions imposed by law upon mining claimants, may be, and perhaps have been, raised and decided. As in cases of trespass, possession is held *prima facie* proof of title.[10] And where both parties claim under the same grantor, the regularity of the location is not in issue.[11] Where the action is to recover possession of a mining claim, located on the public domain, the ordinary rule in ejectment, that plaintiff must recover on the strength of his own title, and not upon the weakness of his adversaries, does not apply, for the reason that neither claims *title*, and therefore he, who has the superior right, when the action is instituted, must prevail.[12] But though possession be sufficient, it has been held that it only extends to the actual workings, unless a lode, which extends to the ground in dispute, be discovered, prior to the commencement of the action.[13] This is the proper remedy, when the party entitled to possession has been disseized, and the wrongdoer is in adverse possession. It does not depend, as in case of trespass, upon actual or constructive possession at the time of ouster.[14] It may be by one of several cotenants against the others,[15] or by all the tenants in common jointly.[16] And the only necessary parties defendant to the action are those whose possession, or claim of right, conflicts with that of plaintiff.[17] And where, pending the suit against several defendants, plaintiff sells out to one of the defendants, the controversy as to *him is ended*.[18] In California the action may

be for possession and for damages, or mesne profits, or distinct actions may be brought for possession and for damages.[19] The holder of the legal title to the possessory right, as distinguished from the equitable owner, or person for whose use and benefit the property was purchased, has been held in Nevada the proper party plaintiff.[20] Where mere *possession* of public land is relied upon by one who has been ousted after the lapse of a reasonable time for location and improvement, he can only recover against the person in possession by showing an actual, open, and notorious prior possession.[21] But subjection of the land to the party's use is sufficient evidence of possession. Occupation in person or by agent is not absolutely necessary.[22] Ejectment may be maintained for an entire claim by a purchaser, on the strength of his continued and recognized possession to the boundaries described in a defective certificate of location referred to in his deed.[23] Although, as we have seen, that this, or its equivalent, is the proper remedy in case of actual disseizin,[24] yet under the code of Colorado, in the possessory action, there substituted for ejectment, this element is not necessary. The defendant need not be in actual adverse possession. It is sufficient if he exercise acts of ownership over the property, or "claims title" thereto, or "some interest" therein, at the time of the commencement of the action.[25] Indeed, under the provisions of that code the possession of defendant is not in issue. He can only deny plaintiff's right, set up his own, or disclaim any interest in the premises, which is equivalent to a confession of judgment, except that he would in the case of disclaimer be entitled to his costs.[26] This remedy cannot be resorted to for breach of contract, as a means of enforcing its terms. The action should be for specific performance.[27]

Forcible entry and unlawful detainer, or forcible entry and

detainer, is a remedy which almost explains its own limitations, as applied to mining claims. The gist of the action is that possession was taken by force.[28] In general, it does not involve either a question of title or right of possession, except the right to be restored to possession of which the party has been forcibly deprived. This remedy may lie where the plaintiff is a trespasser against the legal owner.[29] Whereas a party, who has the right of entry, cannot be dispossessed by an action of ejectment, because he enters forcibly.[30] As a judgment in this kind of action does not determine either the right of property or the right of possession, it constitutes no defence to an action of ejectment.[31] The value of a mining claim was held immaterial to affect the question of jurisdiction in an action of this kind.[32] *Possession* by plaintiff, and *force* by defendants are necessary elements of an action of this character, except where it is merely for unlawful detainer by a tenant. Hence it would not lie in favor of a prospector, who had not been in possession for several months, prior to defendant's entry, and such entry was peaceable.[33] But where plaintiff's employes were sleeping in a quartz mill, which he was working, under a lease, and the product of the day's work was still in the amalgamating pans, when defendants entered and took possession and retained it against plaintiff's protest, it was held that the facts made out a case of forcible entry.[34] And where the verdict in an action against several individuals and a corporation in possession was *guilty*, as to the individuals, and *not guilty* as to the corporation, it was held that the verdict established plaintiff's possession, which was incompatible with the lawful possession of the corporation, and therefore mandamus would issue to compel the sheriff to execute the writ restoring plaintiff to possession.[35]

Injunction is a remedy frequently and almost necessarily

resorted to in mining controversies, and except where the relief is peculiar to some of the state codes, is governed by the general rules of equity jurisprudence. This mode of relief may be resorted to to prevent the removal of ore or mineral from a mining claim, without showing other irreparable injury, for the reason that such removal is taking away the substance of the estate.[36] Or to prevent a miner from extracting gold from patented land.[37] So, injunction and an action for damages was held to lie to prevent a party from depositing refuse matter on plaintiff's claim in such a manner as to render it useless, and prevent plaintiffs from working and enjoying their property.[38] And a miner may be enjoined from damaging trees and other improvements, on land in the lawful possession of another prior to the location for mining purposes.[39] So may this extraordinary remedy be invoked to protect a water ditch from injury or destruction, and where the allegations in the bill are sufficient to warrant the relief asked, and are not denied in the answer, the judgment will be as prayed for.[40] Injunction has been held to lie, to prevent interference with the right to condemn a right of way over other claims, in cases where such right of condemnation existed under the statute or local customs, or both.[41] So it has been employed against the patentee of a tract as agricultural land containing a mine, restraining such patentee from the assertion of title to the mine, or interference with the owner of the mine.[42] So also to restrain the working of a placer claim by aliens, though such aliens had possession prior to complainant.[43] And to restrain the collection of taxes illegally levied on mining property, where the levy and seizure interrupted the working of the mine.[44] Where the ordinary injunction is prayed to restrain the working of a mine, the object is to pre-
-e the property pending the litigation to try the right

of property, or possessory right.[45] But it is not an indispensable prerequisite to the granting of a restraining order that a suit shall be pending between the parties to try the title to the property. The institution of such a suit may be ordered, and the injunction proceedings will be auxiliary to such suit when commenced pursuant to such order.[46] Such suit must be diligently prosecuted, if already pending, or *laches* in this respect will be a ground for refusing the injunction.[47] The usual averments of facts, showing irreparable injury, inadequacy of remedy by action at law for damages, title of plaintiff, and insolvency of defendants, are proper to be made as the facts may warrant.[48] But the allegation of insolvency, or inability of defendant to respond in damages would hardly be held essential, where such relief, if obtained, would be inadequate.[49] The foregoing are cases arising, for the most part, where the *prohibitory* power of the court was invoked. The requisite relief may, however, require an order *mandatory* in effect if not in form. In a case of overflow of a placer from the back-waters of a mill-dam, the proper order was held to be one requiring a reduction of the height of the dam, and a perpetual injunction to restrain its being raised above the point to which it was necessarily reduced to remove the overflow.[50] And where defendants by means of a tunnel wrongfully intercepted the water previously appropriated by complainant, and diverted the same to defendants' use, a preliminary injunction, restraining the continuance of such diversion, was granted, where obedience to the injunction required the construction of a bulk-head across defendants' tunnel.[51] But a judge at chambers was held to have no power by an *ex parte* order to change the possession of a mining claim held by complainants after judgment for defendants.[52] *Affirmative relief* of this character may be

had under the laws of Colorado, in cases where the complainant has been ousted from the possession of mining property by fraud, force or violence, or kept out of possession by threats, or by words or actions, which have a natural tendency to excite fear or apprehension of danger, or where such possession was taken from complainant by entry of the adverse party on Sunday or a legal holiday, or while the party in possession was temporarily absent therefrom. The injunction when granted has the force and effect of a writ of restitution.[53] There is one point upon which there seems to be some difference of opinion between the judges of the district courts, as to the proper construction of the clause requiring the issue of a temporary injunction on the filing of the bill. It being held that the temporary injunction contemplated, was one restraining defendants from prosecuting work on the property, while others incline to the belief that a temporary writ of restitution is intended. Certainly the latter view is the one most consistent with the purposes, as well as the express language of the statute. The former section referred to as a guide for the temporary order[54] does not refer specially to injunctions to restrain work on mines, but to all kinds of injunctions "other than those to stay a suit or judgment at law," and provides for the conditions upon which the injunction shall issue. The purposes of the section, giving affirmative relief by injunction, has nothing whatever to do in determining the *title* or ultimate *right of possession*. It is not granted upon the ground that irreparable injury will be done by removal of mineral, but only considers the unlawful manner in which defendant obtained possession, or *rather*, in which complainant was ousted. For these *reasons*, the temporary order, restraining the working of *he mine*, would seem inapplicable by any kind of infer-

ence; and it is certainly not rendered applicable by the express language of the statute. In restraining threatened injury to the property, it matters not who is in possession.[55] The question of injury would also seem to be excluded from consideration where the only grievance complained of was that complainant had been deprived of his actual possession. As the granting or refusing injunctions is largely a matter of discretion with the court or judge to whom the prayer is addressed—a discretion regulated by law—they will not or should not exercise it by granting an injunction, without a strong showing, and especially not where the injuries to complainant would be trivial, as compared with those which would follow the granting of the relief prayed for.[56] It has been held no abuse of this discretion to refuse to enjoin the erection of a dam by defendant on his own premises to prevent the unobstructed flow of tailings,[57] nor to refuse restraint upon the continuance of mining operations injurious to a ditch, after the same had already been so undermined as to destroy its usefulness.[58] Nor where the diversion of water is threatened, and complainant is in no condition to use it.[59] Injunctive relief will only be administered, where the material allegations of the complaint are not denied, or the complainant makes sufficient showing to overcome the denials in the answer.[60] But where the complaint is not denied, injunctions granted at the discretion of the court or judge will not be disturbed.[61] The right to this relief may be lost by *laches*, or long continued acquiesence in defendants' occupation of the mine, and erection of expensive improvements.[62] The necessary *parties* to an injunction proceeding, which has for its object the restraining of *defendant from* work on a mine, are ordinarily the one *out of possession*, as the *plaintiff*, and the one in posses-

sion, by himself or his agents and servants, as *defendant*. But the court in a proper case will not be deprived of its jurisdiction by the absence of parties in interest, so long as there are those within reach of process, who but for the restraining order would commit the mischief. Carrying out this view it was laid down in two very able opinions delivered in a case arising in the United States Circuit Court for the Ninth Circuit,[63] that where non-resident owners of a mine were committing injuries upon the rights of the complaining party, and were consequently beyond the reach of process within the district, they were not necessary parties, and their absence would not prevent the court from effectually restraining the parties within its jurisdiction, whether they were co-owners or mere agents.

Actions to quiet title are brought by parties in possession against those who claim an interest adverse to them. As their own possession is a matter necessary to be proved, where constructive possession, according to rules and customs, is relied on, it devolves upon plaintiff to establish, (1) the existence of the local rules or customs within the district; (2) that by such rules or customs, particular acts are required to be performed in the location and working of claims, and (3) that plaintiff has substantially complied with such requirements.[64] In support of the allegation that a record is, or was, required to be kept by the customs of the district, the book of records itself would be competent evidence.[65] It would be no defence to such an action to allege prior abandonment or forfeiture by plaintiff, without setting up a subsequently acquired right by defendant.[66]

1 Hugunin vs. McCunniff, 2 Col. 367; Fitzgerald vs. Urton, 5 Cal. 308; Burdge vs. Underwood, 6 Cal. 45, McCarron vs. O'Connel, 7 Cal. 152; English vs. Johnson, 17 Cal. 107.

2 Rogers vs. Cooney, 7 Nev. 213.

3 Hugunin vs. Cunniff, *supra*.
4 Columbus Co. vs. Dayton Co., 18 Cal. 615.
5 Raffetto vs. Tiori, 50 Cal. 363.
6 Myers vs. Farquharson, 46 Cal. 190.
7 Bakley vs. Tielcke, 2 Mont. 59.
8 McCarron vs. O'Connell, 7 Cal. 152.
9 Mining Co. vs. Tarbet, 98 U. S. 463.
10 Campbell vs. Rankin, 99 U. S. 261; Grady vs. Early, 18 Cal. 108; Richardson vs. McNulty, 24 Cal. 339; Mallett vs. Uncle Sam M. Co., 1 Nev. 188.
11 Mining Co. vs. Taylor, 100 U. S. 37.
12 Richardson vs. McNulty, 24 Cal. 339.
13 Zollers vs. Evans, 1 Col. Law Rep. 217; opinion by HALLETT, J., Cir. Ct. U. S., Dist. Col., October Term, 1880.
14 Raffetto vs. Tiori, 50 Cal. 363; Dilley vs. Sherman, 2 Nev. 67.
15 Alford vs. Dewin, 1 Nev. 207; Sharon vs. Davidson, 4 Nev. 416.
16 Goller vs. Fett, 30 Cal. 481.
17 Waring vs. Crow, 11 Cal. 366; Dutch Flat, &c. Co. vs. Mooney, 12 Cal. 534.
18 Bullion M. Co. vs. Crœsus M. Co., 2 Nev. 168.
19 Field vs. Columbet, 4 Sawyer, 524.
20 Phillpots vs. Blasdel, 8 Nev. 62.
21 Sankey vs. Noyes, 1 Nev. 68; McFarland vs. Culbertson, 2 *id.* 280; Stainінger vs. Andrews, 4 *id.* 59; Robinson vs. Imperial, &c. Co., 5 *id.* 44; Lynch vs. Lawson, 8 *id.* 162; Kraft vs. Corlow, 9 *id.* 21; Eureka, &c. Co. vs. Way, 11 *id.* 171; Courtney vs. Turner, 12 *id.* 345.
22 Quicksilver M. Co. vs. Hicks, 4 Sawyer, 688.
23 HALLETT, J., in Harris vs. Equator, &c. Co., 2 Col. Law Rep. 63. (U. S. Cir. Ct.).
24 Raffetto vs. Tiori, *supra*.
25 Brown vs. State, 1 Col. Law Rep. 394 (Sup. Ct., Col., April 22, 1881); Code of Col. § 248.
26 Code Col., § 250.
27 Felger vs. Coward, 35 Cal. 650.
28 Hoopes vs. Myer, 1 Nev. 433; Peacock vs. Leonard, 8 Nev. 84.
29 Lorimer vs. Lewis, 1 Morris (Ia.), 253.
30 Depuy vs. Williams, 26 Cal. 309.
31 Mitchell vs. Hogood, 6 Cal. 148.
32 Small vs. Gwinn, 6 Cal. 447.
33 Laird vs. Waterford, 50 Cal. 315.
34 Scarlett vs. Lamarque, 5 Cal. 63; Fogarty vs. Kelly, 24 *id.* 319.
35 Fremont vs. Crippen (sheriff), 10 Cal. 211.
36 Merced M. Co. vs. Fremont, 7 Cal. 317; United States vs. Pax-

New York bar claims and the Rich claims; and northerly by claims known as the Bank claims. Said claims of plaintiffs above described being 120 feet in width, more or less, and extending back across New York bar in length 300 feet, more or less, and further known as the Dutch claims."[1]

1 Grady vs. Early, 18 Cal. 108.

§ 160. **Jurisdiction.**—Courts in the states having general jurisdiction, or those whose special jurisdiction extends to actions involving the title to real estate, are entitled to try questions as to possessory rights to mining claims on the public domain.[1] And where the matter at issue is nothing more than the question of compliance or non-compliance with the local law, their jurisdiction is exclusive between citizens of the state.[2] It is otherwise, of course, where a federal question, or the construction of an act of Congress, is necessary to determine the rights of the parties. In the latter event the federal courts will have concurrent jurisdiction, and such cases may be removed to these tribunals from the state courts.[3] But the petition for such removal should state the particular questions involved in the controversy which gives jurisdiction to the United States courts and renders the case removable.[4] The jurisdiction of the *subject-matter*, or *territorial jurisdiction*, will be governed by the situation of the mining claim, according to counties, or districts, as the state law may determine. Jurisdiction of this character cannot be conferred on the court by consent of parties, as it may be where it is only a question of jurisdiction of the person.[5]

1 Hicks vs. Bell, 3 Cal. 219; Van Etten vs. Jilson, 6 Cal. 19.
2 Magee vs. U. P. R. R. Co., 2 Sawyer, 447.
3 Frank, &c. M. Co. vs. Larimer, &c. Co., 1 Col. Law. Rep. 495.
4 Trafton vs. Nougues, 4 Sawyer, 178.
5 Hastings vs. Burning Moscow, 2 Nev. 93; Perkins vs. Sierra &c. Co., 10 Nev. 413; Welch vs. Phillips, 11 Nev. 187.

CHAPTER XV.

LOCAL STATUTES.

I. ARIZONA.
II. CALIFORNIA.
III. COLORADO.
IV. DAKOTA.
V. IDAHO.
VI. MONTANA.
VII. NEVADA.
VIII. NEW MEXICO.
IX. OREGON.
X. UTAH.
XI. WASHINGTON.
XII. WYOMING.

I. ARIZONA.

SECTION 161—Location and registration according to district rules.
162—Duties of recorders—Fees.
163—Prior locations valid.
164—Rights of territory relinquished.
165—Act applies only to lode claims.
166—Repeal of conflicting acts.
167—When act took effect.
168—Partition.
169—Thirty days' notice of application.
170—Proceedings after notice.
171—Appearance—Procedure—Appeal.
172—Limited application of statute.
173—Repealing clause.
174—Limitation of actions.
175—Jurisdiction.
176—Soldiers to hold claims.
177—Placer mines and mining.

§ 161. Location and registration according to district rules.—SEC. 1. The mining districts heretofore created in the several counties of this territory are hereby authorized and empowered to make all necessary rules and regulations for the location, registry and working of mines therein: *Provided*, That all locations and registrations of mines and mineral deposits hereafter made in any of the said districts shall be transmitted to the county recorder for record within sixty days after the same shall have been *located*.

§ 162. **Duties of recorders—Fees.**—SEC. 2. The county recorders of the several counties are authorized and required to procure suitable books in which the records of all mines and mineral deposits shall be kept, which said books shall be paid for out of the county treasury, and they shall receive for their services herein the following fees: For recording and indexing each claim not exceeding one folio, one dollar; and for each additional folio, twenty cents.

§ 163. **Prior locations valid.**—SEC. 3. Nothing in this act shall be so construed as to affect the claims to mines and mineral deposits heretofore located and duly recorded.

§ 164. **Rights of territory relinquished.**—SEC. 4. The claim of the territory to all mining claims heretofore located is hereby abandoned, and the same are hereby declared open to relocation and registry: *Provided*, That nothing herein contained shall be so construed as to affect mining claims heretofore sold and disposed of by the territory.

§ 165. **Act applies only to lode claims.**—SEC. 5. Nothing in this act shall be construed to apply to placer mines or mining, or other mineral deposits other than those commonly called veins or lode mines.

§ 166. **Repeal of conflicting acts.**—SEC. 6. Chapter fifty of the Howell code, entitled, "Of the registration and government of mines and mineral deposits," as well as all other acts or parts of acts in conflict with the provisions of this act, are hereby repealed.

§ 167. **When act took effect.**—SEC. 7. This act shall take effect and be in force from and after the first day of January, A. D. eighteen hundred and sixty-seven.[1]

[1] An act providing for the location and registration of mines and mineral deposits, and for other purposes, approved November 5, 1866—COMPILED LAWS, p. 533.

AN ACT TO PROVIDE FOR THE SEGREGATION OF MINING CLAIMS.[1]

§ 168. **Partition.**—SEC. 1. Whenever any one or more joint owners or tenants in common of gold, silver, copper or mineral bearing ledges or claims, may desire to work or develop such ledges or claims, and any other owner or owners thereof shall fail or refuse to join in said work, after due notice of at least thirty days, given by publication in one newspaper printed in the county in which such ledges or claims are located; and if none be printed in said county, then in any newspaper printed in the territory; said notice to have publication in four successive weeks of said paper; said other owner or owners may upon application to the district court of the district wherein the ledge or claim is situated, cause the interests of said parties so refusing to be set off or segregated as hereinafter set forth.

[1] Approved September 30, 1867.

§ 169. **Thirty days' notice of application.**—SEC. 2. The owner or owners of any mineral-bearing ledge or claim, after the expiration of said thirty days' notice having been given, may, if the party or parties notified fail or refuse to join in the working or developing said ledge or claim, apply to the court of the county in which said claim may be situated, for a partition or segregation of the interest or interests of the party or parties so failing or refusing to join.

§ 170. **Proceedings after notice.**—SEC. 3. The party or parties so applying shall set forth the fact that the said parties have been duly notified, in accordance with section one of this act, and that said party or parties have failed or refused to join in said work; all of which shall be sustained by the oath or affirmation of one or more of the parties applying; and, upon such application being

made, the clerk of the said court shall post a notice at the office of the county recorder, and in two other conspicuous places within the district, stating the application, and notifying the parties interested that unless they appear within sixty days, and show good cause why the prayer of the petitioner should not be granted, that the same will be granted if good cause can be shown.

§ 171. **Appearance — Procedure — Appeal.**— SEC. 4. At the expiration of said sixty days, if the party or parties notified do not appear and show good cause why the prayer of the petitioner should not be granted, the court shall appoint two commissioners to go upon the ground and segregate the claims of the parties refusing to join; and in case they do not agree, they to choose a third party; and said commissioners shall make a report in writing to said court, who shall issue a decree in conformity with said report, which shall be final, except appeal be taken to the supreme court within thirty days after issuance thereof.

§ 172. **Limited application of statute.**—SEC. 5. The provisions of this act shall not apply to the counties of Yavapai and Pima, and the county of Yuma.

§ 173. **Repealing clause.**— SEC. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

§ 174. **Limitation of actions.**— SEC. 1. No action for the recovery of property in mining claims, or for the recovery of possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within two years before the commencement of the action.

SEC. 2. No cause of action or defense to an action,

founded upon the title to property in mining claims, or to the rents or profits out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within two years before the commencement of the act in respect to which such action is prosecuted or defense made.

SEC. 3. All acts or parts of acts in conflict with this act are hereby repealed[1].

[1] Approved Nov. 5, 1866.

§ 175. **Jurisdiction.**—SEC. 1. The district courts of said territory shall have exclusive original jurisdiction of all suits and proceedings relating to mines and mineral and auxiliary lands, and the registry and denouncement of the same, and all the jurisdiction, power and authority conferred upon the probate courts and probate judges by chapter fifty of the Howell code, entitled "Of the registry and government of mines and mineral deposits," or otherwise, are hereby conferred upon the district courts and district judges respectively.

SEC. 2. That section two of title one of said chapter is hereby repealed, and also all the other provisions of said chapter, conferring jurisdiction upon the probate courts and probate judges, over suits and proceedings relating to mines, mineral and auxiliary lands, as well as other acts and parts of acts inconsistent with the provisions of this act.

SEC. 3. All suits and other proceedings in said probate courts, now pending therein, and over which said probate courts have jurisdiction, are hereby transferred to, and shall be continued in, the district court of the county in which said suits and proceedings are now pending.

SEC. 4. The clerks of the probate courts shall, within thirty days after the publication of this act, transfer to and file in the office of the district courts of their respective counties, all records and papers in suits and proceedings relating to mines, mineral and auxiliary lands, which records and papers shall be kept and filed by the clerks of said district courts, and when so transferred and filed, said suits and proceedings shall be proceeded with as though commenced in said district courts; *Provided*, That in counties where there shall be no clerks of the district courts, the records and papers shall be transferred and filed as aforesaid within thirty days after the appointment of said clerks and their acceptance thereof.[1] No action in regard to mining claims shall be maintained before any justice of the peace.

[1] Approved Dec. 30, 1865.

§ 176. Soldiers to hold claims.—SEC. 1. All persons in the military service of the United States or this territory shall be allowed to locate claims on mineral lodes or veins in the limits of this territory, subject to the requirements of the mining laws of this territory, and shall be protected in the possession of the same, and shall have the same rights in all respects, in regard to such claims, as like persons not in the military service.

SEC. 2. All the laws of any mining district contrary to the spirit and provisions of this act are declared to be null and void, and shall not be evidence in any court having jurisdiction of mining suits in this territory.[1]

[1] An act allowing all persons in the military service of the United States and of this territory to hold mining claims. Approved Nov. 9, 1864.

§ 177. Placer mines and mining.—SEC. 1. It shall be lawful for any person, company, or association who shall place upon the mineral lands of this territory com-

monly called placer mining grounds, a pump or pumps, having a capacity sufficient to raise at least one hundred gallons of water per minute, with an engine or other power attached thereto, of sufficient power to work the same, with the *bona fide* intention of working the said placer grounds for the purpose of extracting the gold therefrom, to locate an amount of said placer grounds equal in extent to one quarter section, in such form and direction as he or they may elect; *Provided*, That said location shall in no case be more than one mile in length, nor less than one-quarter of a mile in width; and, *Provided*, That said machinery shall be used at least three months in each year for raising water to extract the gold from said grounds, and the presence of said machinery upon said grounds shall be the only evidence of title to said grounds; but in no case shall this act be so construed as to mean placer grounds which can be worked by water brought in ditches or flumes from any stream or other deposit of water; and said locations shall not in any case be made upon any grounds in the possession of any miner or miners at the time of location.

SEC. 2. This act shall only apply to the county of Yuma.[1]

[1] Act approved Dec. 30, 1865.

II. CALIFORNIA.

SECTION 178—Possession and possessory actions.
179—Protection of growing crops from injury by miners.
180—Jurisdiction of actions.
181—Customs, usages, and regulations.
182—Limitation of actions.
183—Foreign miners.
184—Mining corporations.
185—Same—Inspection of books—Penal provisions.
186—Assessment of stock, etc.
187—Canal, etc., companies.
188—Change of place of business—Transfer agencies.

SECTION 189—Assessment and sale for non-payment of stock of corporations generally.
190—Amendment of articles of association.
191—Removal of officers of corporations.
192—Protection of stockholders in mining corporations.
193—Mining partnerships.
194—Conveyance of mining claims.
195—Sale of decedents' interest in mines.
196—Sale of state mineral lands.
197—Liens.
198—Taxation.
199—Easements—Right of way.
200—Water rights.
201—Police regulations—Protection of miners.
202—Quicksilver.
203—Fixtures.

CALIFORNIA.[1]

§ 178. Possession and possessory actions.—By an act of the legislature[2] it was provided that occupancy of public lands, except mineral lands, could maintain an action against trespassers. This act was repealed by act of April 20, 1852,[3] which provided that settlers upon the public lands for the purpose of cultivating or grazing the same, might maintain actions for interference with or injuries to their possession; *provided*, that where such lands contained mines of any of the precious metals the possession for agricultural or grazing purposes should not preclude the working of said mines.

1 The manner of locating claims, defining boundaries, recording, etc., seems to be governed entirely by district regulations, except as affected by acts of Congress.

2 Stat. 1850, p. 203.

3 Stat. 1852, p. 158.

§ 179. Protection of growing crops from injury by miners.[1]—By a subsequent statute it is provided in Section *one* that in mining no person shall destroy or injure growing crops, nor undermine or injure any building,

improvement, or fruit trees growing or standing upon mineral lands, and the property of another, except as provided in the act. Section *two* provides that any one desiring to occupy such public land in the possession of another, occupied by such crops, improvements, or trees, shall first give a bond to the owners of the crops, improvements, or trees, to be approved by a justice of the township, with two or more sureties in a sum to be fixed by three disinterested citizen householders of the township, one to be selected by the obligor, one by the obligee, and one by the justice, conditioned that the obligor shall indemnify the obligee for all damage to such improvements, crops, or trees resulting from the proposed mining operations. Section *three* declares a violation of either of the preceding sections a misdemeanor punishable by fine of not less than fifty nor more than two hundred dollars, or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment, with the proviso that such mineral lands may be worked by miners after the crops are harvested.

1 Stat. 1855 p. 145.

§ 180. **Jurisdiction of actions.**—Except in San Francisco, justices of the peace were by statute clothed with jurisdiction of actions to determine the right to mining claims.[1] This was subsequently amended so as to give them jurisdiction "of an action to determine the right to a mining claim, and for damages for injury to the same, when the damages do not exceed two hundred dollars."[2] By a subsequent statute[3] it is provided in Section *sixty-three* that upon the application of plaintiff in such actions the justice may appoint a receiver of the proceeds of the mine, pending the action. This section is amended by a later act,[4] wherein the provisions of the amended statute are substantially embodied, with the additions that the application may be by the party out of

possession on notice of one day to the other party. If the parties agree upon a receiver, he shall be appointed, otherwise he shall be selected and appointed by the justice. The receiver shall take an oath that he is not interested in the action, and will honestly receive, keep, and account for the proceeds, etc. The justice has power to issue an order to any sheriff or constable to put the receiver into possession, which he shall retain so long as the action is undetermined in any court. The court in which the action is pending has power, on two days' notice to the parties, to make orders for the disposal of the proceeds for the safety of the same. The court also has power, on application of the receiver, to punish for contempt any one who disturbed the receiver in the possession of the claim. By Section *sixty-four* of the amended act,[5] the receiver is required to keep an accurate account of receipts and disbursements, pay out the proceeds on the order of the court, on demand of either party give security for the faithful performance of his trust, and shall be allowed out of the proceeds a reasonable compensation, not to exceed 10 per cent. of such proceeds.

1 Stat. 1853, p. 298, Ch. viii., § 67, subd. 10.
2 Act of April 19, 1856, Stat. 1856, p. 133.
3 Stat. 1854, p. 71.
4 April 28, 1855, Stat. 1855, p. 199.
5 Stat. 1854, p. 71.

§ 181. Customs, usages, and regulations.—In actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action.[1]

1 Stat. 1851, p. 149.

§ 182. **Limitation of actions.**[1]—By Section *one* of the statute, the time within which actions for the recovery of property in mining claims, or the possession thereof may be maintained, is two years from the seizin or possession of the property by the plaintiff, his ancestor, predecessor, or grantor. By Section *two*, the same limitation is fixed to actions, or defenses to actions founded upon the title to property in mining claims, or to the rents and profits out of the same. The action or defense cannot be maintained unless it appear that the plaintiff or defendant, or the person under whose title the action or defense is prosecuted or made, his ancestor, predecessor, or grantor was so seized or possessed, within two years next preceding the bringing of the action.

1 Stat. 1863-64, p. 91.

§ 183. **Foreign miners.**[1]—It was provided by statute that only citizens of the United States and California Indians should be allowed to take gold from any of the mines of the state, without first having obtained a license therefor and paid a license tax. That foreigners (aliens) without such license should not be allowed to prosecute or defend any action in the courts of the state, and that the employers of such foreigners should be liable for the amount of such license tax for each alien so employed.[2] This statute was repealed by a subsequent act, in which the greater part of the repealed statute was re-enacted, omitting the exclusion of foreigners from the right to prosecute or defend actions.[3] A subsequent amendment extended the right to mine without license to those who had declared their intention to become citizens prior to the passage of the act.[4] An act repealing and re-enacting the foregoing provisions left the requirement of a license from foreign miners; classifying those who might become citizens, and excluding others; requiring the

tax of $4 to be paid monthly, and declaring that such license was not transferable.[5] Still later the matter was under legislative consideration, and it was enacted that all persons and companies interested with such unlicensed foreigners, as partners, lessors, or otherwise in mining, should be liable for the license tax of each foreigner with whom such person or company was interested; that the mining ground, improvements, tools and machinery could be sold for the payment thereof; that the collector could summon and examine under oath any person or company believed to have in his possession, or under his control, any money, gold dust, or other property of such foreign miners; or as to the indebtedness of such person or company to such foreign miners. And in case of such possession or control of property, or indebtedness to such foreign miners, the collector was authorized to collect from the person or company so indebted the amount of the license tax, and require the delivery of the gold dust, money or property.[6] The foregoing provisions, except such as had been repealed, as already noticed above, were re-enacted in substance, and it was provided that in collecting such license tax the collector could seize and sell the property of the persons liable, on one hour's notice, at public auction, and after deducting the tax and expenses, pay over the balance to the owner of the property; that he might follow delinquents into other counties; that he might administer oaths to foreigners without certificates of naturalization; that all foreigners not eligible to become citizens residing in mining districts should be considered miners; that delinquents from whom collection could not be made, should be required to work on the roads at $1 per day to liquidate the amount, and failing or refusing to perform such work, would be guilty of misdemeanor, punishable by imprisonment in the county jail not less than five nor more than thirty days.[7] The

only other provision on this subject is one providing for the distribution of the proceeds of miners' licenses, 10 per cent. to the school fund, and the residue to the general funds of the county, and directing how and by whom the license shall be issued; the record to be kept, and providing for official reports to the board of supervisors.[8]

[1] Stat. 1850. Repealed March 14, 1851.
[2] Stat. 1852, p. 84.
[3] Stat. 1853, p. 62.
[4] Stat. 1854, p. 55.
[5] Stat. 1855, p. 216.
[6] Stat. 1858, p. 302.
[7] Stat. 1861, p. 447.
[8] Stat. 1867-68, 173.

§ 184. **Mining Corporations.**—The first enactment concerning corporations provides for a certificate of corporation by the incorporators; the filing of the certificate; the management of the company's business and election of trustees; the appointment of officers; authorizes trustees to make calls and pass by-laws; declares stock to be personal property, and prescribes when shares are not transferable; makes a certified copy of certificate evidence of incorporation; requires certificate of capital to be filed with county clerk; requires annual reports; provides that dividends shall only be declared from actual profits; capital stock to be paid in money; liability of officers for all corporate debts, in case of false certificate or report; exempts personal representatives of deceased stockholders from personal liability, but allows them to vote as stockholders; personal liability of other stockholders; permits change in nature of business or amount of capital, and prescribes the manner in which such change may be effected by stockholders' meetings; fixes the liability of trustees for debts in excess of capital; declares when stockholders shall not be personally

liable; provides for an alphabetical list of stockholders, upon which all transfers must be entered to be valid; that such list shall be open to inspection; makes the list evidence; prescribes a penalty for refusing to make entry in the list, or to exhibit the same when required.[1] By act of April 14, 1853,[2] the method of forming mining and other specially designated corporations is prescribed, and it is provided by Section *twenty-seven* of the act that corporations formed thereunder shall not be subject to the provisions of the act of 1850. Section *one* provides that "such corporations and the members thereof, being subject to all the conditions and liabilities herein imposed, and to none others." This section is amended, so as to limit the quantity of land to be held by mining companies to what is actually necessary to carrying on the business of the company, in no case to exceed 1,440 acres, and "an individual member of such company or association, in his corporate capacity," is limited to holding or owning not to exceed 80 acres. Agricultural corporations are disqualified from holding mineral lands; but the amendment disclaims retroactive force.[3] Section *two* of the act, which prescribes that three persons may form the corporation, the proceedings and the certificate of incorporation, is amended, requiring a certificate to contain the corporate name; the objects; amount of capital stock; time of corporate existence—not to exceed fifty years; number of shares; number and name of trustees to manage the business for the first three months, and the names of city or town and county in which the principal place of business is to be located. This certificate is to be signed and acknowledged before a competent officer, filed in the office of the county clerk of the county of the principal place of business, who shall certify to a copy to be filed in the office of the secretary of state. The amendment so cures all former corporate acts of companies that had

previously filed the certified copy of their certificate with the secretary of state, and declares such companies legally incorporated, and their former acts lawful. A subsequent amendment of the same section has the additional requirement that a certified copy of the certificate shall be filed in the office of the clerk of each of the several counties in which it is proposed to carry on business.[4] Section *three* renders copies of the certificate evidence. Section *four* defines the corporate powers. Section *five* provides for a board of trustees; the election of members thereof; the filling of vacancies therein; their duties and powers, and how such duties and powers shall be exercised. Section *six* provides for elections. Section *seven* that a majority of the board shall constitute a quorum. Section *eight*, meetings. Section *nine*, capital stock and mode of transfer. Section *ten*, payment of subscriptions; penalty for failure to pay, and the mode of sale for delinquency. Section *eleven*, representation of stock by agents. Section *twelve* defines the status of hypothecated stock. Section *thirteen* defines the duties of trustees respecting the declaration and payment of dividends; the preservation of the capital stock inviolate; prescribes a penalty for the violation thereof, and fixes the liability of trustees assenting to such violation. It also provides for a division of stock after payment of debts. Section *fourteen* prohibits the incurring of indebtedness beyond the capital stock, and renders those liable who violate the prohibition. Section *fifteen* forbids the issuing of bills of credit. Section *sixteen*, as to the individual liability of stockholders, is so amended[5] as to render them proportionately liable, jointly or severally, for all the debts of the company incurred during the time such stock was held. Payments made by any one of such stockholders shall be taken into account and credited to his stock, and judgment cannot be obtained against any stockholder

who has paid his proportion of the corporate debts. Section *seventeen* exempts from personal liability those who hold stock as agents, but declares the owners of hypothecated stock to be responsible. The remaining provisions of the act, from section *nineteen* to *twenty-six*, inclusive, treats of the duties of the recording clerk; the increase of capital stock; dissolution of corporations; the repeal of chapter five of the act of April 22, 1850, and the continuation of corporations formed under previous acts.[6]

1 Stat. 1850, p. 365.
2 Stat. 1853, p. 87.
3 Stat. 1858, p. 133.
4 Stat. 1871-72, p. 526.
5 Act of April 27, 1863.
6 Stat. 1853, p. 87.

§ 185. **Same—Inspection of books—Penal provisions.**—A statute supplementary to the foregoing, provides in section *one* that the trustees of corporations for the purpose of ditching, mining, or conveying water for mining purposes, shall cause to be kept a book containing an alphabetical list of all the stockholders, showing the number of shares held by each, and when they purchased. Also a book or books containing the by-laws, orders and resolutions of the company and board of trustees, with the date of their adoption. Such books are to be open for inspection during the business hours of all days except Sunday and the fourth of July, at the principal office or place of business, and the creditors, stockholders, their agents or attorneys may make extracts therefrom, or on paying a reasonable fee demand a certified copy of their contents from the clerk or officer in charge. The books or a certified copy shall be presumptive evidence of the facts therein stated, in any action against the company or a stockholder. Section *two* declares a breach of duty by the officer in charge of

the books in failing to carry out the requirements of preceding section a misdemeanor, with a penalty of $201, recoverable by the party injured. And for neglect to keep such book for inspection as aforesaid, the company shall forfeit to the people of the state a like sum. And further, in case of failure for one year to comply with the provisions of the statute, the company may, by suit brought for that purpose, on summons of not less than ten nor more than thirty days be disincorporated, so as to deprive the company of its privileges and leave it subject to the remedies against it provided by the act.[1]

[1] Stat. 1857, p. 121.

§ 186. **Assessment of stock, etc.**—An act providing for assessments on the stock of companies organized in the state for mining operations without the state, but whose principal office is within the state, requires such assessment to be uniform; not to exceed at any one time five per cent. of the capital stock. Notice of such calls is to be personally served on the stockholders, or be published four weeks in a paper at the principal business place, and also in one nearest the place where mining operations are carried on. In case of default after such notice so many of such shares shall be sold as will suffice to pay the assessments levied. The sale shall be pursuant to the by-laws, *provided* that it be after thirty days' published notice as aforesaid, at auction to the highest bidder, or rather the one who for the smallest number of shares, will pay the calls and expenses of advertisement and sale.[1]

[1] Stat. 1861, p. 41.

§ 187. **Canal, etc., companies.**—A statute authorizing the formation of *canal companies*, under the provisions of the act of April 14, 1853,[1] and the several

of its articles of incorporation and a certificate of the trustees that the preliminary requirements have been complied with, and from the time of such filing the removal shall be complete.[1] But this act does not authorize the removal of the principal places of business out of the state.[2] But it is elsewhere made lawful for mining corporations to have agencies without the state for the transfer of its stock, or the issuance thereof. The stock so transferred is required to have, in addition to the signatures of the president and secretary, the countersignature of the agent in charge of the transfer agency, and when the transfer is made the original certificate must be surrendered. The transfer agency may be regulated by by-laws made by the stockholders, and shall be under the control of the trustees.[3]

1 When publication is completed, and the directors have filed in the offices of the clerks of both counties, and in the office of secretary of state, certified copies of stockholders' consent, the notice of change, proof of publication, and certificate of removal, nothing more is required. [Civil code, § 585.]

2 Stat. 1863–64, p. 76.

3 Stat. 1863–64, p. 429; §§ 586, 587, Civil code.

§ 189. Assessment and sales for non-payment of stock of corporations generally.—Is provided for by statutes, which apply to all corporations. Section *two* of an act for that purpose, provides that no one assessment shall exceed five per cent. of the capital stock; that none shall be levied while previous assessments are unpaid in whole or in part, excepting when the powers of the corporation have been exhausted to enforce such collection, or the collection has been enjoined or otherwise legally restrained. Section *three* invalidates all levies not made with the concurrence of a majority of the board and entered on the corporate records. Section *four* requires the order of levy to specify the amount when, to whom,

and where payable; the day when unpaid assessments shall become delinquent, not less than thirty nor more than sixty days from the date of the order; and a day for sale of delinquent stock, not less than fifteen nor more than sixty days, from date of delinquency. Section *five* gives the form of a notice which the secretary is to cause to be published on making the order, which notice contains the substance of the orders required to be made by the trustees. Section *six* requires the notice to be published weekly for four successive weeks in a daily or weekly paper, at the designated principal place of business, or nearest thereto, and also in some paper in the county where the works are situated, if there be any, and such works are in the United States; *provided*, that such notice may be personally served by copy with like effect. Sections *seven* and *eight* require the publication in the same papers of a notice of sale, giving the form of the notice, which embodies all the essentials of names, location of business, with the previous orders, etc., necessary to give full information of the proposed sale, and the particular shares to be sold. Section *nine* provides that the publication, if in a daily, shall be for ten days, exclusive of Sundays and holidays, and if in a weekly, two weeks, the first publication being fifteen days prior to sale. Section *ten* vests the corporation with full power to sell and transfer so much of the stock as is necessary to pay over-due assessments against the holders of the delinquent shares respectively, together with the costs of sale. Section *eleven* authorizes the secretary to make the sale pursuant to notice, provided the assessments and costs be not previously paid. Section *twelve* designates as the highest and best bidder, the one who pays the assessment for the smallest number of shares. Section *thirteen* provides that in the absence of a purchase for the amount of assessments and costs, the delinquent stock may be bid in by the company at such price as will square

accounts, and thereafter shall remain non-assessable and non-dividend-paying while it is the property of the company. Corporate stock so held shall be subject to the disposition of the stockholders, under the by-laws, or by a vote of a majority of the remaining share-holders. Section *fourteen* provides that an extension of times or dates may be made for notices, etc., not to exceed thirty days, by order of the trustees and publication of the extension with the notice; but there can be but one such extension. Section *fifteen* holds the assessment valid, notwithstanding subsequent errors or omissions; but in case of such error invalidates all proceedings subsequent to the levy. Section *sixteen* renders the maintenance of an action to recover stock sold, where the ground of recovery is defect or irregularity in the levy, notice, or sale, to depend upon a tender of all sums paid, with interest, and the bringing of the action within six months after the sale. Section *seventeen* repeals prior conflicting statutes, with a saving clause covering proceedings already commenced.[1] An act, supplementary to the foregoing, supplies the evidence of publication and sale. The affidavit of the printer, his foreman, or principal clerk, is prima facie evidence of the former, and the affidavit of the secretary or other auctioneers of the latter, including the time and place of sale, the quantity and description, to whom, at what price, and the payment of the purchase money. Such affidavits shall be filed with the company, and certified copies are to be taken as true, correct, and admissible in evidence in all courts as the originals would be. The certificate of the secretary, under the seal of the corporation, dispenses with primary proof of the official character or genuineness of the secretary's signature.[2]

1 Stat. 1865-66, p. 458. This act also expressly repeals an act of April 14, 1864, which was, for the most part, re-enacted by the repealing act. See *Stat.* 1863-64, p. 402.

2 *Stat. 1869-70, p. 229.*

§ 190. **Amendments of articles of association—Or certificate of incorporation.**—By a majority vote of the board of trustees, and by the written assent or approving vote of two-thirds of the stockholders, and the filing of such amended articles or certificate, shall clothe the company with the same powers as though the amendments had been embodied in the original articles or certificate. The following provisos are made: That the time of the existence of the corporation shall not be extended; that the original and amended articles shall contain all that the law requires; that defects in the original shall not be cured by the amendment; that in the absence of written assent by all the stockholders the intention to amend shall be advertised for sixty days in a paper published at the principal place of business, and the written protest of one dissenting stockholder may prevent the adoption of the amendment; and that nothing in the act shall authorize a diminution of capital stock.[1]

[1] Stat. 1869-70, p. 107.

§ 191. **Removal of officers of corporations**—Is provided for. On a petition of a majority of the stockholders, to the judge of the county of the principal place of business, in which the number of shares of each shall be verified by each owner thereof, said judge issues notice to the stockholders, of a meeting to be held for that purpose not less than five nor more than ten days from the first publication of the notice, giving the time and place of meeting in the county, and the object of the meeting. The notice shall be published daily in one or more papers of the county for at least five days before the meeting. *After* an organization of the meeting by those claiming *shares*, electing president and secretary, no one shall *take part* in the further proceedings but those proved to

be stockholders. One hour from the appointed time is given the stockholders to assemble, when it appearing that holders of less than one-half the stock are present, the meeting shall stand dissolved. A vote of the holders of *two-thirds*[1] of the capital stock, the board will be required to furnish a detailed statement of the affairs of the company, its business and property. If the holders of *more than two-thirds*[2] of the shares are present, they shall proceed to vote, and if the holders of a majority of all the stock favor the removal of one or more of the officers, they shall be deposed and the meeting shall proceed to elect their successors. Upon a verified report of such election the county judge shall issue certificates to the newly elected officers, with an order that the proper books, papers and effects pertaining to their offices shall be surrendered to them. The certificate and order shall be recorded by the county clerk[3].

1 Amended April 1, 1876, to read "the majority."
2 Amended April 1, 1876, to read "a majority."
3 Stat. 1871-72, p. 443.

§ 192. **Protection of stockholders in mining corporations.**—The secretary is required to produce the books of the company for examination by the holder of stock of the par value of $500, during business hours of every day, excepting Sundays and legal holidays, and on demand of such stockholder balance the books up to the end of each month, and make out a balance sheet. And on or before the tenth day of January and July of each year prepare a statement of the transactions of the company for the preceding six months, with a full description of the company's property. This statement shall be open to the inspection of such stockholder. All demands for inspection, etc., *shall* be made at the principal office. *Such stockholder shall* at all business or working hours *of the day be privileged* to inspect the workings of the

mine, surface or underground, upon presenting his certificate of stock, and it is made the duty of all officers, managers, agents and superintendents to allow such inspection. The violation of any of the foregoing provisions subjects the trustees to a fine of two hundred dollars, costs and expenses of the stockholder in traveling to and from the property, to be recovered by the suffering stockholder in any court of competent jurisdiction, either of the county of the principal place of business or where the mine is situated[1].

[1] Stat. 1873–74, p. 866. For general corporation law, see civil code, §§ 283–403.

§ 193. **Mining partnerships.**—Following are the provisions of the civil code:[1] Section 2511. A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same. Section 2512. An express agreement to become partners, or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom. Section 2513. A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital, or whole number of shares. Section 2514. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its use. This lien exists, notwithstanding there is an agreement among the partners that it must not. Section 2515. The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership

property. Section 2516. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase becomes a member of the partnership. Section 2517. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership, unless he purchased in good faith, for a valuable consideration, without notice of such lien. Section 2518. A purchaser of an interest of a partner in a mine, when the partnership is engaged in working it, takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership. Section 2519. No member of a mining partnership or other agent, or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof. Section 2520. The decision of the members owning a majority of the shares or interests in a mining partnership, binds it in the conduct of its business. An act concerning partnerships for mining purposes, approved April 4, 1864,[2] provided for the sale of the partner's interest, who failed to pay assessments, on account of expenses and outlays incurred under partnership contract, something after the manner of sales of delinquent stock by corporations, notice, personal or by publication, the former to residents and the latter to non-residents, for thirty days, if personal and four months if by publication, the assessment being sixty days overdue, was all that was required to authorize the sale by the copartners of the delinquent's interest. By a later and more comprehensive and searching statute, this was repealed. And it is enacted in Section *one* of the repealing act, that two or more owners, occupants *or locators*, or persons associated together

otherwise than as a body corporate, with or without written agreement, for mining purposes on the public lands, shall become copartners with any one associating himself with them, upon receiving notice of the fact, and shall be subject to all the liabilities imposed by the act. By Section *two* it is provided that any member of such company or association, desiring to work the claim located, may call a meeting by notifying the other members to have an assessment levied for that purpose, and at such meeting, whether there be representatives of a majority in interest present or not, a majority of those present may decide to work the claim at the expense of all, and thereafter levy assessments not oftener than once in thirty days, to defray the expenses. These assessments may be levied by any member not delinquent. When the company has by-laws the assessments shall only be for the amount thereby authorized. No new assessment shall be made until previous ones are collected, or the means for that purpose have been exhausted. By Section *three* written notice to the member, his heirs, executors, etc., when the assessment is thirty days overdue, is required, which notice should specify the name of the mine, mining district, and the liability. Section *four* provides for the service of notice. To residents of the county where the mine is located it must be by personal delivery, or left at his residence. To residents of the state without the county, by the post or through the express office, addressed to him at his residence, if known. To non-residents of the state, and those whose residences are unknown, by publication, once a week for eight weeks, in a paper of the county where the mine is located, if any, otherwise in a paper of an adjoining county. Section *five* declares the forfeiture complete at the expiration of ten days after *personal* service; twenty days after posting, or the full

period of publication, and authorizes a sale of so much of the interest of the delinquent as will pay delinquent assessments. Section *six* requires the sale to take place at the mine on ten day's notice, by posting in three public places. The sale is to be by offering the smallest number of feet or shares at a time, and continuing until enough is realized, or all is sold. The sale may be conducted by any constable of the township, sheriff or auctioneer, and is to be by auction. The deed of the officer selling is *prima facie* evidence of his authority, and the regularity of proceedings prior to sale. Section *seven* applies the provisions of the act to all persons who have refused to join in incorporating the company. Section *eight* is the repealing clause.[3]

[1] Hart's Civil Code of Cal., 344 (1876).
[2] Stat. 1863–64, p. 478.
[3] Stat. 1867–68, p. 173.

§ 194. **Conveyance of mining claims**—May be by bill of sale or other instrument of writing, sealed or unsealed. All prior conveyances by this method are validated; but such conveyances are held fraudulent and void except as between the parties, unless there be an immediate and continued change of possession, or the instrument is acknowledged and recorded. This act only applied to gold mining claims until March 20, 1863, when this limitation was repealed.[1]

[1] Stat. 1860, p. 175.

§ 195. **Sale of decedents' interests in mines.**—Generally an interest in a mine, except when represented by stock in a corporation, is regarded as real estate; but such interests may be brought into an estate in course of administration and sold as personal property on petition of any creditor, partner, or member of a company, or of the president of a corporation. Such petition should

describe the condition and situation of the mine, interest or corporation. The order of sale is only made after a hearing before the probate judge, upon summons from him giving the time and place, within not less than four nor more than ten weeks, to show cause against the order of sale. The order, or summons, shall be personally served on the parties interested ten days before hearing, or published four successive weeks in a newspaper. But if the written consent of the parties interested be obtained, the notice may be dispensed with. If upon the hearing it appear that the interests of the estate, or of the partners, tenants in common or corporations would be best subserved thereby, the executor or administrator will be ordered to sell in conformity with the laws providing for the sale of other real property under order of of the probate court, except where the interest is represented by shares of stock, when the sale shall be made as of other personal property.[1]

[1] Stat. 1865-66, p. 359.

§ 196. Sale of state mineral lands.—The original statute, as amended, regulating the sale of the sixteenth and thirty-second sections of lands designated, or found in fact to be mineral in character, is in substance as follows, with the amendments noted: Section *one* provides that one desiring to purchase shall make affidavit of citizenship or declaration of intention; of lawful age, and a desire to purchase the land described by legal subdivisions; that the applicant has not entered to exceed forty acres, including that applied for; that there is no adverse occupation, or if any, that the plat of the township has been filed, and the adverse occupant in occupation *six months* or over. Section two provides that persons in *actual* possession at the time of survey by the United States or at the passage of the act, shall be preferred

purchasers, "*to the extent of his or her mining claim*, provided he or she make application for the purchase of the same on or before the first day of January, 1877, if the plat of such survey be already filed in the United States land office; and if not so filed, then within six months after the filing of such plat as aforesaid."[1] Section *three* provides, that in cases of *contest* the matter shall, within thirty days after application, be referred by the surveyor-general or register, unless sooner, at the request of either party to the *superior*[2] court of the county in which the land is situated. Upon filing a copy of the order of reference with the clerk of the court, either party may commence the action; unless the action be commenced within ninety days, the party making the demand, or where the order is filed without demand, the adverse party, shall be deemed to have waived his claim. Section *four* prescribes the price of the land at $2.50 per acre, payable, in gold coin, to the county treasurer within fifty days from the approval by the surveyor-general, in default of which the land reverts to the state. Payments to the county treasurer to be paid over and accounted for as other moneys received for state lands. Section *five* requires the same proceedings as to approving locations, issuing certificates of purchase or patents, etc., as are required in the sale of non-mineral sections, except as is specially provided for in the act. Section *six* subjects all state patents to the lands in question, to accrued water rights, ditches and reservoirs acquired by prior possession, and confirms all rights of way for ditches, canals, mining and other purposes over all the sixteenth and thirty-second sections. Section *seven* prohibits the issuing of a patent to lands embracing mining claims, except to the owners thereof ["and not to such *owners in excess of forty* acres"],[3] and provides for the *reimbursement of* those who have paid for such lands

not owning the mining claim embraced therein, and provides, also, that the owner of the claim shall apply to purchase within six months after the township plat is filed in the local land office, or "on or before the first day of January, 1877."[4] Owners of such claims who have entered into agreements with purchasers of these lands to secure title to their mining claims are not to have the benefit of the act.[5]

1 Amend. Act Feb. 3, 1876—Stat. 1875-6, p. 20. Words in italics omitted in original, and applicants were required to apply within six months after filing plat, or ten months after passage of act.

2 Altered by act April 6, 1880, from "district," Stat. 1880, p. 26

3 Omitted in amendment of Feb. 3, 1876.

4 Supplied by Am. Feb. 3, 1876, in lieu of "within ten months after the passage of this act."

5 Stat. 1873-74, p. 766.

§ 197. **Liens.**—An act securing liens to mechanics and others[1] was extended to include bridges, ditches, flumes or aqueducts for mining and other purposes, giving the mechanic, laborer or material man a lien upon such structures.[2] This act, however, was repealed April 26, 1862,[3] by a general lien law, which was repealed by the general lien law of March 30, 1868.[4]

1 April 19. 1856.

2 Stat. 1857, p. 84.

3 Stat. 1862, p. 384.

4 Stat. 1867-68, p. 589.

§ 198. **Taxation.**—The law exempting mines from taxation has been repealed so far as it affects mining claims that have become private property by grant from the governments of the United States, Spain, or Mexico.[1]

1 Stat. 1863-64, p. 471.

§ 199. **Easements—Rights of way—Ditches—Drains Flumes and tunnels—Dumpage.**—The following are provisions of a statute upon the subjects embraced in

the title of this section: Section *one* is that owners of mining claims should have free ingress and egress across other claims, for all necessary purposes. Section *two*, that where a mine cannot be conveniently worked without a road thereto, a ditch or cut to convey water thereto or therefrom, a flume or tunnel, or a place to dump tailings, either of which must pass across or through, or the dumping ground be upon, other claims, the owner of the first mentioned mine shall be entitled to such easement by complying with the provisions of the act. Section *three*, when the right cannot be acquired by private agreement, the party claiming it shall petition the county court, or the judge, if in vacation, praying for an award of the same. The petition is to be verified and contain a description of the easement sought, the claim of the petitioner, and also those to be affected, show that the right has not been acquired by agreement, and pray for the allowance of the right and the appointment of three commissioners to assess the damages. Section *four* provides for the issuing of a citation to the owners of claims to be affected, on the filing of the petition, to appear on a day fixed not less than ten days from service, which service shall be as provided for summons in ordinary proceedings, and show cause why the prayer should not be granted. Section *five* provides that upon hearing proofs on the return day, or an adjourned day if necessary, the court or judge, if satisfied of the necessity for the right, shall make an order adjudging the same, and appointing three disinterested parties to assess the damages. Section *six* requires the commissioners, being sworn, to proceed without delay to examine the property, take testimony as to the value of the property and the damages, and report in writing to the court. Such report shall designate and describe the proposed easement by course, magnitude and location, the value of lands appropriated,

and assign the damages to each servient claim. Section *seven* provides that for good cause shown, within ten days from the filing of the report, the same may be set aside on motion and a new commission appointed. But where this or any subsequent report is allowed to stand, the court or judge shall make an order in pursuance thereof. Section *eight* provides for the successful petitioner, after paying the damages awarded, entering into the enjoyment of his privilege. Section *nine* makes the provisions of foregoing sections applicable to miners wishing to discharge tailings into a water-course upon which water rights have been acquired; but provides that such commission shall not be appointed unless the court or judge be satisfied that the privilege can be enjoyed without especial injury to the riparian proprietors. Section *ten* requires all costs and expenses, including five dollars a day to the commissioners, to be paid by the petitioner.

Stat. 1869-70, p. 569.

§ 200. **Water rights.**[1]—SEC. 1410. The right to the use of running waters flowing in a river or stream, or down a cañon or ravine, may be acquired by appropriation. SEC. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, ceases to use it for such a purpose, the right ceases. SEC. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe or aqueduct by which the diversion is made to places beyond that where the first use was made. SEC. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished. SEC. 1414. As between appropriators, the one first in time is the first in

right. SEC. 1415. A person desiring to appropriate water must post a notice in writing in a conspicuous place, at the point of intended diversion, stating therein: 1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure. 2. The purposes for which he claims it, and the place of intended use. 3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted. SEC. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain. SEC. 1417. By "completion" is meant conducting the waters to the place of intended use. SEC. 1418. By a compliance with the above rules, the claimants' right to the use of the water relates back to the time the notice was posted. SEC. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water, as against a subsequent claimant who complies therewith. SEC. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases. SEC. 1421. The recorder of each county must keep a book in which he must record the notices provided for in this title. SEC. 1422. The rights of riparian proprietors are not affected by the provisions of this title.[2]

[1] Title viii., *Civil Code.*

[2] Hart's Civil Code, p. 212.

§ 201. **Police Regulations—Protection of miners.**—Where the owners of quartz mines find it necessary to work at a depth beyond three hundred feet, where the number of twelve men are daily employed in such mines, they are required to provide an additional mode of egress, connecting with the main workings at not less than one hundred feet from the surface. In case of death or injury to any one by reason of failure to comply with these requirements, the owner or owners of such mine shall be jointly liable to the injured party, or in case of death, to the heirs or relatives of deceased. In the latter case the action may be maintained and recovery had under the provisions of "an act requiring compensation for causing death by wrongful act, neglect or default." Approved April, 26, 1862[1]. Also for the protection of *coal miners* the owner, lessee, or agent is required to keep a copy of an accurate map on a scale of one hundred feet to the inch, at the mines, open to inspection by the workmen. To provide at least two shafts or slopes, or outlets, separated by strata not less than one hundred feet in breadth, with distinct means of ingress and egress. To provide adequate ventilation, not less than fifty-five cubic feet per second of pure air for every fifty workmen employed, to be circulated throughout the workings and expel the noxious gases, and all such workings shall be kept clear of standing gas. For the purposes aforesaid, to employ a competent inside overseer, who shall also keep careful watch of the timbering, etc., and see that loose coal, shale, slate, etc., over head is secured against falling, and see to all things involving the safety of the workmen. For any injury to person or property, occasioned by any violation of the act, an action will lie against the negligent party. For wilful negligence by the overseer he is punished as for a misdemeanor, and in case of death from such wilful negligence, shall be

deemed guilty of manslaughter. Boilers used for generating steam, are required to be kept in good order, and examined by a competent boilermaker as often as once in three months. The act does not apply to opening a new mine.[2]

1 Stat. 1871-72, p. 413.
2 Stat. 1873-74, p. 726.

§ 202. **Quicksilver.**—A statute which has for its object the prevention of adulteration of quicksilver requires producers and importers to stamp upon every tank or vessel the name of the producer or importer, the date when the stamp is applied, and the quantity contained in the vessel. This stamp is required to be placed on wax, over the orifice or top of the vessel in such a way that the contents of the vessel can not be discharged without breaking the same. This must be done before removing the vessel from the works of the producer or the warehouse of the importer. The falsification of any such stamp is declared to be forgery, punishable by imprisonment for not less than one, nor more than five years. The adulteration of quicksilver by mixing base metals therewith is made a misdemeanor, punishable by fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year, or both such fine and imprisonment. The vending of quicksilver not previously employed in mining or the mechanics' arts, of which the purchaser is informed, which has been adulterated as aforesaid, renders the seller liable in quadruple damages to the purchaser, to be recovered by civil action[1].

1 Stat. 1865-66, p. 191.

§ 203. **Fixtures.**—Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine[1].

1 *Hart's Civil Code, § 661, p. 126.*

III. COLORADO.

§§ 204-17. CH. LXVI. GEN. LAWS. "MINES AND MINING CLAIMS."

§§ 218-33. PRESENT LAW OF LOCATION, ETC. LODE CLAIMS.

§§ 234-45. RESIDUE OF CH. LXVI, GEN. LAWS—SURVEY OF MINES IN LITIGATION—PENAL PROVISIONS—DRAINAGE.

§§ 246-7. LOCATION, ETC.—PLACER MINES.

§§ 248-55. CODE PROVISIONS.

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MINES AND MINING CLAIMS.[1]

§ 204. Term "claim" defined—Prior Rights Preserved.—SEC. 1. The term claim, as used in the
797 mining portions of this statute, when applied to a

[1] *General Laws, Ch. lxvi.*; Rev. Stat., Ch. lxii.

lode, shall be construed to mean one hundred feet of the length of such lode, surface measurement, of the entire width of such lode or crevice; *Provided*, That in any case where the regulations of any mining district have heretofore defined the term claim to mean other than as above defined, nothing in this chapter shall be so construed as to impair the rights of any person or persons holding claims under such regulations as may have been heretofore established by the people of the district in which such claim or claims are situated.

* These numbers in the side correspond to the numbers of paragraphs in the "General Laws."

1798 § 205. **Right of way for water.**—SEC. 2. Whenever any person or persons are engaged in bringing water into any portion of the mines, they shall have the right of way secured to them, and may pass over any claim, road, ditch, or other structure; *provided*, the water be guarded so as not to interfere with prior rights.

1799 § 206. **Security of surface rights.**—SEC. 3. No person shall have the right to mine under any building or other improvement, unless he shall first secure the parties owning the same against all damages except by priority of right.

1800 § 207. **Record of tunnel claims.**—SEC. 4. If any person or persons shall locate a tunnel claim, for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein.

1801 § 208. **Tunnel claims defined.**—SEC. 5. Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on

each lode so discovered; *provided*, they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant; and persons working said tunnel shall have the right of way through all lodes which may lie in its course.

§ 209. **Cross lodes, or lodes uniting.**—SEC. 6. When it shall appear that one lode crosses, runs into, or unites with any other lode, the priority of record shall determine the rights of claimants; *provided*, That in no case where it appears that two lodes have crossed one another, shall the priority of record give any person the privilege of turning off from the crevice or lode which continues in the same direction of the main lode upon which he or they may have recorded their claim or claims, but such person or persons shall, at all times, follow the crevice running nearest in the general direction of the main lode upon which he or they may have recorded their claim or claims. *1802*

§ 210. **Two crevices the same lode.**—SEC. 7. Where two crevices are discovered at a distance from each other, and known by different names, and it shall appear that the two are one and the same lode, the persons having recorded on the first discovered lode shall be the legal owners. *1803*

§ 211. **Flooding claims.**—SEC. 8. In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property *1804*

of other persons; but it shall be the duty of every miner to take care of his own tailings upon his own property, or become responsible for all damages that may arise therefrom.

§ 212. **Right of way for hauling quartz.**—SEC. 9. *1805* Every miner shall have the right of way across any and all claims for the purpose of hauling quartz from his claim.

§ 213. **Soldiers' claims—When forfeited.**—SEC. 10. *1806* All claims taken up and recorded by persons who have, since the recording of the same, enlisted in the army of the United States, or the volunteer force of this state, shall be deemed and held as real estate for a period of two years from the expiration of their term of enlistment or discharge from service; after which time, if not represented by the said soldier or soldiers, all such claims shall be forfeited to any person who may take up the same.

§ 214. **District records—Transcripts used as evidence.**—SEC. 11. *1807* A copy of all the records, laws, and proceedings of each mining district, so far as they relate to lode claims, shall be filed in the office of the county clerk of the county in which the district is situated, within the boundaries of the district attached to the same, which shall be taken as evidence in any court having jurisdiction of the matters concerned in such record or proceeding; and all such records of deeds and conveyances, laws and proceedings of any mining district heretofore filed in the clerk's office of the proper county, and transcripts thereof duly certified, whether such record relate to gulch claims, lode claims, building lots, or other real estate, shall have the like effect as evidence.

AN ACT FOR THE RELIEF OF PRE-EMPTORS AND LOCATORS OF VEINS OR LODES OF QUARTZ OR OTHER ROCK ON THE MINERAL LANDS OF THE PUBLIC DOMAIN.[1]

[1] From Session Laws 1870.

§ 215. **Locations to conform to act of Congress.**—
1808 SECTION 1. No statutory law of the state [territory] of Colorado shall be so construed as to prohibit the location of three thousand feet or less on any vein or lode in the manner prescribed in Section 4 of an act of Congress, approved July twenty-six, one thousand eight hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands," and for other purposes; nor to prejudice any rights to obtain patents for the same as provided in said act.

§ 216. **Validating former pre-emptions and locations.**—SEC. 2. All pre-emptions and locations of
1809 three thousand feet or less on any vein, lode, or ledge, made since the passage of the said act of Congress, and conforming to the same, shall be good and valid.

§ 217. **Prior rights.**—SEC. 3. Nothing in this act
1810 shall be so construed as to prejudice any rights acquired prior to the passage of this act.

AN ACT CONCERNING MINES.[1]

[1] From Session Laws of 1874.

§ 218. **Length of lode claims.**—SEC. 1. The length
1811 of any lode claim hereafter located may equal but not exceed fifteen hundred feet along the vein.

§ 219. **Width of lode claims.**—SEC. 2. The width of
1812 lode claims hereafter located in Gilpin, Clear Creek, Boulder and Summit counties, shall be seventy-five feet on each side of the center of the vein or

crevice; and in all other counties the width of the same shall be one hundred and fifty feet on each side of the center of the vein or crevice: *Provided*, That hereafter any county may at any general election, determine upon a greater width, not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county, by such vote at such election, may determine upon a less width than above specified.

§ 220. **Recording.**—SEC. 3. The discoverer of a lode shall, within three months from the date of dis-
1813 covery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate, which shall contain: *First*—The name of the lode. *Second*—The name of the locator. *Third*—The date of location. *Fourth*—The number of feet in length claimed on each side of the center of discovery shaft. *Fifth*—The general course of the lode as near as may be.

§ 221. **What location certificate to contain.**—SEC. 4. Any location certificate of a lode claim which
1814 shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

§ 222. **Location and boundaries.**—SEC. 5. Before filing such location certificate, the discoverer shall
1815 locate his claim by: *First*—Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well defined crevice. *Second*—By posting at the point of discovery, on the surface, a plain sign or notice containing the name

of the lode, the name of the locator, and the date of discovery. *Third*—By marking the surface boundaries of the claim.

§ 223. **Marking surface boundaries.**—SEC. 6. Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to-wit: One at each corner, and one at the center of each side line. Where it is practically impossible, on account of bed rock, to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place[1].

1816

[1] Amendment of 1876.

§ 224. **Substitute for discovery shaft.**—SEC. 7. Any open cut, cross cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.

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§ 225. **Time for sinking discovery shaft.**—SEC. 8. The discoverer shall have sixty days, from the time of uncovering or disclosing a lode, to sink a discovery shaft thereon.

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§ 226. **What location includes.**—SEC. 9. The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof; and all lodes and ledges

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throughout their entire depth, the top or apex of which lie inside of such lines extended downward vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim; but shall not include any portion of such lodes or ledges beyond the end lines of the claim, or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode.

§ 227. **Lodes not followed beyond lines on the strike.**—SEC. 10. If the top or apex of a lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior lines.

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§ 228. **Right of way for ditches and flumes.**—SEC. 11. All mining claims now located, or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes, or of any tramway or pack trail, whether now in use, or which may be hereafter laid out across any such location: *Provided, always*, that such right of way shall not be exercised against any location duly made and recorded, and not abandoned prior to the establishment of the ditch, flume, tramway or pack trail, without consent of the owner, except by condemnation, as in case of land taken for public highways. Parol consent to the location of any such easement, accompanied by the completion of the same over the claim, shall be sufficient without writings; and, *provided further*, that such ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise.

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§ 229. **Security of surface rights.**—SEC. 12. When the

1822 right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused may enjoin such miner from working until such security is given. The order for injunction shall fix the amount of bond.

§ 230. **Additional certificate of location.**—SEC. 13.
1823 If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: *Provided*, That such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof, shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.

§ 231. **Affidavit of work and improvements.**—SEC.
1824 14. Within six months after any set time or annual period allowed for the performance of labor, or making improvements upon any lode claim, the person on whose behalf such outlay was made, or some person for him shall make and record an affidavit in substance as follows:

STATE OF COLORADO, } ss.
——— County. }

Before me, the subscriber, personally appeared ———, who being duly sworn, *saith that at least* ——— dollars' worth of work or

improvements were performed or made upon (here describe claim or part of claim), situate in —— mining district, county of —— State of Colorado. Such expenditure was made by or at the expense of ——, owners of said claim, for the purpose of holding said claim.

(Jurat.) SIGNATURE.

And such signature shall be *prima facie* evidence of the performance of such labor.

§ 232. **Relocation of abandoned claims.**—SEC. 15. *1825* The relocation of abandoned lode claims shall be by sinking a new discovery shaft, and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts, if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property.

§ 233. **Certificate to cover but one location.**—SEC. 16. *1826* No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all.[1]

[1] Gen. Laws, p. 629.

AN ACT CONCERNING MINES.[1]

§ 234. **Survey of mines in litigation.**—SEC. 1. *1827* In all actions pending in any district court of this state wherein the title or right of possession to any

mining claim shall be in dispute, the said court, or the judge thereof, may, upon application of any of the parties to such suit, enter an order for the underground as well as surface survey of such part of the property in dispute as may be necessary to a just determination of the question involved. Such order shall designate some competent surveyor, not related to any of the parties to such suit, or in anywise interested in the result of the same, and upon the application of the party adverse to such application, the court may also appoint some competent surveyor, to be selected by such adverse applicant, whose duty it shall be to attend upon such survey and observe the method of making the same; said second surveyor to be at the cost of the party asking therefor. It shall also be lawful in such order to specify the names of witnesses named by either party, not exceeding three on each side, to examine such property, who shall hereupon be allowed to enter into such property and examine the same. Said court, or the judge thereof, may also cause the removal of any rock, debris, or other obstacle in any of the drifts or shafts of said property, when such removal is shown to be necessary to a just determination of the question involved; *Provided*, *however*, that no such order shall be made for survey and inspection, except in open court, or in chambers, upon notice of application for such order of at least six days, and not then except by agreement of parties, or upon the affidavit of two or more persons, that such survey and inspection is necessary to the just determination of the suit, which affidavits shall state the facts in such case, and wherein the necessity for survey exists, nor shall such order be made unless it appears that the party asking therefor had been refused the privilege of survey and inspection by the adverse party.

[1] From Session Laws, 1874.

§ 235. **Penal provision—Dispossession by force, etc.** 1828 —SEC. 2. In all cases where two or more persons shall associate themselves together for the purpose of obtaining the possession of any lode, gulch, or placer claim, then in the actual possession of another, by force and violence or threats of violence, or by stealth, and shall proceed to carry out such purpose by making threats against the party or parties in possession, or who shall enter upon such lode or mining claim for the purpose aforesaid, or who shall enter upon or into any lode, gulch, placer claim, quartz mill, or other mining property, or not being upon such property, but within hearing of the same, shall make any threats, or make use of any language, signs, or gestures calculated to intimidate any person or persons at work on said property from continuing to work thereon or therein, or to intimidate others from engaging to work thereon or therein, every such person so offending shall, on conviction thereof, be fined in a sum not to exceed $250, and be imprisoned in the county jail not less [than] thirty days nor more than six months; such fine to be discharged either by payment or by confinement in said jail until such fine is discharged at the rate of $2.50 per day. On trials under this section, proof of a common purpose of two or more persons to obtain possession of property as aforesaid, or to intimidate laborers as above set forth, accompanied or followed by any of the acts above specified by any of them, shall be sufficient evidence to convict any one committing such acts, although the parties may not be associated together at the time of committing the same.

§ 236. **Homicide on forcible entry—Aiders and abettors.** 1829 —SEC. 3. If any person or persons shall associate and agree to enter, or attempt to enter, by force of numbers, and the terror such numbers is cal-

culated to inspire, or by force and violence, or by threats of violence, against any person or persons in the actual possession of any lode, gulch, or placer claim, and upon any such entry, or attempted entry, any person or persons shall be killed, said persons, and all and each of them, so entering or attempting to enter, shall be deemed guilty of murder in the first degree, and punished accordingly. Upon the trial of such cases, any person or parties cognizant of such entry, or attempted entry, who shall either be present, aiding, and assisting, or shall by promise of money, property, influence, assistance, or other thing of value, in anywise encourage such entry, or attempted entry, shall be deemed a principal in the commission of said offense.

AN ACT TO PROVIDE FOR THE DRAINAGE OF MINES, AND TO REGULATE THE LIABILITIES OF MINERS IN CERTAIN CASES, AND TO REPEAL ALL TERRITORIAL ACTS ON THE SUBJECT.

1830 **§ 237. Drainage of contiguous mines.** — SEC. 1. Whenever contiguous or adjacent mines, upon the same or upon separate lodes, have a common ingress of water, or from subterraneous communication of the water, have a common drainage, it shall be the duty of the owners, lessees, or occupants of each mine so related, to provide for their proportionate share of the drainage thereof.

1831 **§ 238. Contribution by parties benefited.** — Any parties so related failing to provide, as aforesaid, for the drainage of the mines owned or occupied by them, thereby imposing an unjust burden upon neighboring mines, whether owned or occupied by them, shall pay respectively to those performing the work of drainage their proportion of the actual and necessary cost and

expense of doing such drainage, to be recovered by an action in any court of competent jurisdiction.

§ 239. **Companies for drainage incorporated.**—SEC. 3. It shall be lawful for all mining corporations or companies, and all individuals engaged in mining, having thus a common interest in draining such mines, to unite for the purpose of effecting the same, under such common name, and upon such terms and conditions as may be agreed upon; and every such association, having filed a certificate of incorporation, as provided by law, shall be deemed a corporation, with all the rights, incidents, and liabilities of a body corporate, so far as the same may be applicable.

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§ 240. **Forced contribution to drainage.**—SEC. 4. Failing to mutually agree as indicated in the preceding section for drainage jointly, one or more of the said parties may undertake the work of drainage, after giving reasonable notice; and should the remaining parties then fail, neglect, or refuse to unite in equitable arrangements for doing the work or sharing the expense thereof, they shall be subject to an action therefor, as already specified, to be enforced in any court of competent jurisdiction.

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§ 241. **Inspection to determine cost of drainage.**—SEC. 5. When an action is commenced to recover the cost and expenses for draining a lode or mine, it shall be lawful for the plaintiff to apply to the court, if in session, or to the judge thereof in vacation, for an order to inspect and examine the lodes or mines claimed to have been drained by the plaintiff; or some one for him shall make affidavit that such inspection or examination necessary for a proper preparation of the case for trial. he court or judge shall grant an order for the under-

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ground inspection and examination of the lode or mines described in the petition. Such order shall designate the number of persons, not exceeding three, besides the plaintiff or his representative, to examine and inspect such lode and mines and take the measurement thereof, relating the amount of water drained from the lode or mine, or the number of fathoms of ground mined and worked out of the lode or mines claimed to have been drained, the cost of such examination and inspection to be borne by the party applying therefor. The court or judge shall have power to cause the removal of any rock, debris, or other obstacles in any lode or vein, when such removal is shown to be necessary to a just determination of the questions involved: *Provided*, That no such order for inspection and examination shall be made except in open court or at chambers, upon notice of application for such order of at least three days, and not then except by agreement of parties, nor unless it appears that the plaintiff has been refused the privilege of making the inspection and examination by the defendant, his or their agent.

§ 242. When water from mines becomes common property.—SEC. 6. That hereafter, when any per-
1835 son or persons, or corporation, shall be engaged in mining or milling, and in the prosecution of such business shall hoist or raise water from mines or natural channels, and the same shall flow away from the premises of such persons or corporations to any natural channel or gulch, the same shall be considered beyond the control of the party so hoisting or raising the same, and may be taken and used by other parties the same as that of natural water-courses.

§ 243. Liability for damages caused by drainage from mines.—SEC. 7. After any such water shall
1836 have been so raised, and the same shall have flown

into any such natural channel, gulch, or draw, the party so hoisting or raising the same shall be liable for injury caused thereby, in the same manner as riparian owners along natural water courses.

§ 244. **No drainage of undeveloped mines.**—SEC. 8. The provisions of this act shall not be construed to *1837* apply to incipient or undeveloped mines, but to those only which shall have been opened, and shall clearly derive a benefit from being drained.

§ 245. **Evidence under this act.**—SEC. 9. In trial of cases arising under this act, the court shall admit *1838* evidence of the normal stand or position of the water while at rest in an idle mine, also the observed prevalence of a common water level or a standing water line in the same or separate lodes; also the effect (if any), the elevating or depressing the water by natural or mechanical means in any given lode has upon elevating or depressing the water in the same, contiguous or separate lodes or mine; also the effect which draining or ceasing to drain any given lode or mine had upon the water in the same or contiguous or separate lodes or mines, and all other evidence which tends to prove the common ingress or subterraneous communication of water into the same lode or mine, or contiguous or separate lodes or mines.

Approved March 16, 1877.

LOCATION AND REPRESENTATION OF PLACER MINING CLAIMS.[1]

§ 246. **Location and recording of placers.**—SEC. 1. The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is sit-

uated, by a location certificate, which shall contain: First, the name of the claim, designating it as a placer claim; second, the name of the locator; third, the date of location; fourth, the number of acres or feet claimed, and fifth, a description of the claim by such reference to natural objects or permanent monuments as shall identify the claim. Before filing such location certificate the discoverer shall locate his claim: First, by posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed; second, by marking the surface boundaries with substantial posts, and sunk into the ground, to-wit: one at each angle of the claim.

[1] Took effect without approval March 12, 1879.

§ 247. **Annual labor—Forfeiture.**—SEC. 2. On each placer claim of one hundred and sixty acres or more, heretofore or hereafter located, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made by the first day of August, 1879, and by the first day of August of each year thereafter. On all placer claims containing less than one hundred and sixty acres, the expenditure during each year shall not be less than twelve dollars; but where two or more claims lie contiguous, and are owned by the same person, the expenditure hereby required for each claim may be made on any one claim; and upon a failure to comply with these conditions, the claim or claims upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location; *Provided*, the aforesaid expenditures may be made in building and repairing

ditches to conduct water upon such ground, or in making other mining improvements necessary for the working of such claim. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor, or made the improvements, may, at the expiration of the year, to-wit: the first of August, 1879, for the locations heretofore made, and one year from the date of locations hereafter made, give such delinquent co-owner personal notice in writing, or, if he be a non-resident of the state, a notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and mailing him a copy of such newspaper, if his address be known, and if, at the expiration of ninety days after such notice in writing, or after the first publication of such notice, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this action [section] his interest in the claim shall become the property of his co-owners who have made the required expenditures.[1]

1 Session Laws, 1879, p. 140.

CODE PROVISIONS.

§ 248. **Evidence of customs admissible in action.**—SEC. 386. In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations established and in force in the mining districts embracing such claim; and such customs, usages and regulations, when not in conflict with the laws of this state, or of the United States, shall govern the decision of the action.[1]

1 Code Col., p. 144.

§ 249. **Inspection of mines in litigation.**—SEC. 387. Whenever any person, company or corporation shall have any right to, or interest in any mine, lead, lode or

mining claim, which is in possession of another person, company or corporation, and for which a cause is pending in a court of record, bringing into question the right or title to the same, and it shall be necessary for the ascertainment, enforcement or protection of such right or interest, that an inspection, examination or survey of such mine, lead, lode or mining claim, should be had or made, or whenever an inspection, examination or survey of any mine, lead or lode or mining claim shall be necessary to ascertain, protect or enforce the right or interest of any person, company or corporation, in any other mine, lead, lode or mining claim, and the person, company or corporation in possession of such mine, lead, lode or mining claim, of which an inspection, examination or survey is necessary, shall refuse, after three days' demand thereof, in writing, to allow or permit such inspection, examination or survey to be had or made, the party company or corporation desiring an inspection, examination or survey of such mine, lead, lode or mining claim, may present to the district court, or the judge thereof, of the county where the mine, lead, lode or mining claim, of which an inspection, examination or survey is desired is situated, a petition under oath, setting out his or their right to, or interest in, such mine, lead, lode or mining claim, describing it, the possession thereof, or of another mine, lead, lode or mining claim, of which an inspection, examination or survey is necessary by another company or corporation, the reason why it is necessary that such inspection, examination or survey should be had or made, the demand made on the person, company or corporation in possession, to allow or permit such inspection, examination or survey, and his or their refusal to allow or permit the same, and asking an order for the inspection, examination or survey of such mine, *lead, lode* or mining claim, the court or

judge may thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served on the adverse party, company or corporation, which notice shall be served at least three days before the day of hearing. At the time and place appointed, the court or judge shall proceed to hear the petition. Either party may read affidavits on the hearing in the same manner, and subject to the same rules, as on application to dissolve an injunction. If the court or judge be satisfied that the facts stated in the petition are true, an order shall be made for an inspection, examination or survey of the mine, lead, lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode or mining claim, for the purpose of such inspection, examination or survey, in conformity with the order of the court or judge, and any interference with such persons while acting under such order, shall be contempt of court and punished accordingly; provided, that only three witnesses beside the surveyor shall be admitted on the part of the petitioner, and the costs of the proceeding shall abide the result of the suit.[1]

1 Code, Col., p. 144.

§ 250. **Pleadings in possessory action—Complaint.** —SEC. 249. The plaintiff, in his complaint, shall set forth the nature and extent of his estate in the property * * * or if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the state of Colorado, or otherwise, the complaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase,

or by right of actual prior possession on the public domain of the United States. * * * 1

1 Code Col., p. 97.

§ 251. **The answer.**—SEC. 250. The answer to a complaint filed under this chapter shall either specifically deny the material allegations of the complaint or may disclaim any interest in or possession of the property claimed, or any part thereof. The answer may also state, generally as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims.[1] SEC. 258. If the defendant files or makes any other answer or defense than a disclaimer of title or right of possession, it shall not be necessary for the plaintiff to prove him in possession of the premises at the time of the commencement of the action, or at any other time.[2]

1 Code Col., p. 97.
2 Code Col., p. 100.

§ 252. **No abatement of damages on account of improvements.**—SEC. 254. * * * And in case such premises recovered be a lode, vein, or mining claim, the defendant shall not be entitled to any offset for any timbering, cribbing, improvements, or developments made upon the same; neither shall the damages be abated or lessened by reason of such improvements or developments.[1]

1 Code Col., p. 99. By this section it is also provided that in actions for possession of real property the party against whom judgment is rendered may, by paying all costs, be entitled to a new trial.

§ 253. *Injunctions.*—SEC. 2. No writ of injunction shall issue out of the district court upon the order of either the county judge or county court, in case of the

senate by appointment. Section *three* requires the commissioner to keep a seal of office, bearing the words "Commissioner of Mines of the State of Colorado." Section *four* makes it his duty to collect information concerning the production and reduction of minerals in the State; to examine and inquire into the different modes of treating ores, and the relative merits of inventions for mining and metallurgical purposes. By section *five* he is authorized in person or by deputy to visit mines and examine them, to determine their safety. Section *six* makes it his duty to notify the owners of dangerous mines wherein they are dangerous, and require the necessary changes to be made without delay. In case of accident in such mine, subsequent to notice, a certified copy thereof shall be *prima facie* evidence of culpable negligence on the part of the owner complained of. Section *seven* requires the officer to correspond and keep reports in his office showing the condition of different branches of the mining industry of the state. Section *eight* makes it his duty to collect specimens. By section *nine*, to make assays, keep records, and pay proceeds of assays into state treasury. The fees prescribed for assays are: For stone, $1; gold and silver, $2; zinc, lead or copper, $2; analysis of coal, $10; analysis of ores, $5 to $10; analysis of minerals, $3 to $10; analysis of mineral water, not more than $30. For failure to comply with the provisions of the section, as to his keeping a record of receipts and accounting for the money, he may be fined, not to exceed five hundred dollars. Section *ten* makes it his duty to visit annually in person or by deputy each mining county in the state to examine mines. By section *eleven* he is to report annually to the governor. By section *twelve* he is also to examine coal mines every six months, and see that no children under fourteen years of age are therein employed. By section thirteen the

entire time is required at a salary of $3,000 per annum, and by consent of the governor may have a deputy at a salary of $1,200, and the professor of the school of mines at Golden as assistant, at a salary of $700, whose duty it shall be to perform the most difficult duties of the commissioner and his deputy. Section *fourteen* limits the contingent expenses to $2,300, and requires salaries to be paid monthly. Sections *fifteen* and *sixteen*, repeal prior inconsistent acts, and require the property of the state in the hands of territorial assayers to be turned over to the commissioner.[2]

[1] This officer is required by section 1 of Art. xvi, Constitution, to be appointed by the Governor, by and with the advice and consent of the Senate.

[2] Ch. xv. Gen. Laws, p. 126. Approved April 13, 1877.

§ 258. **Mining companies.**[1]—Section *ninety-three* of the act provides that such companies may be formed with power to do all things necessary to carry into effect the objects for which they were formed, as set forth in their certificates of organization. The certificate of organization is required to state whether the stock is assessable or not, and the certificates of stock are to have printed on the face "assessable" or "non-assessable," as the case may be. Section *ninety-four* permits the issuing of paid-up stock for working capital, to be non-assessable until other stock has been assessed to par value. But for no other purpose can a company issue stock both assessable and non-assessable. It may be either. Section *ninety-five* provides that assessable stock may only be assessed to the amount of 5 per cent. of its par value. and not oftener than once in three months; and such assessment can only be authorized by a stockholders' meeting, and by those representing a majority of the stock, of which meeting there shall be published notice, four weeks in a weekly newspaper where the operations

of the company are carried on, and thirty days in a daily paper at the principal place of business, with personal notice or mailing notice to each stockholder. No assessment payable within thirty days from the date the same is ordered by the board of directors. Section *ninety-six* provides for interest on assessments over fifteen days due, and the sale of delinquent shares on ten days' advertisement, and personal notice as provided in section *ninety-five*. But no fraction of a share can be sold, nor shall shares be sold to meet such delinquency within sixty days of the date of assessment. Section *ninety-seven* provides that the number of directors shall not be less than three, nor more than nine, who, except for the first year, shall be annually elected. The meeting for that purpose shall be noticed by ten days' publication, or by personal notice, served or mailed. A majority of the stock must be represented, and the election shall be by ballot. Section *ninety-eight* provides that ore-reducing, mining or tunneling companies may be consolidated under one organization.[2]

1 Ch. xix. "Corporations."
2 Gen. Laws, p. 174.

§ 259. **Costs in adverse suits.**[1]—By "An Act concerning costs in certain cases[2]" it is provided that where the plaintiff in an adverse suit prevails, he shall recover, in addition to costs of suit, his necessary disbursements and a reasonable counsel's fee, not exceeding fifty dollars, for the expense of preparing his adverse claim.[3]

1 Ch. xx.
2 Sess. Laws, 1876.
3 Gen. Laws, p. 195.

§ 260. **Liens.**[1]—By an act to secure liens to mechanics and others,[2] it is provided in Section *three* that all we-

chanics and laborers who perform work or labor, or furnish materials to the amount of $25 or more for construct ing or repairing any * * * water-ditch, flume, aqueduct, or reservoir, shall have a lien on such * * * water-ditch, flume, aqueduct, or reservoir for the amount and value of the work performed or materials furnished, by filing in the recorder's office, within forty days after the completion of the work, a statement containing a notice of intention to hold the lien, a description of the property, and an abstract of the indebtedness, as required by Section *two*, respecting liens on other superstructures. And if the lien is claimed by others than a contractor or material man, such notice and statement are required to be filed within *twenty* days, and a copy of the statement is to be served upon the owners or their agents. It is also provided that where personal service of such notice cannot be had, the owners may be notified through the post-office. By Section *four* of the act, the provisions of the preceding sections are rendered available to "all miners, laborers, and others who work or labor to the amount of $25 or more in or upon any mine, lode, or deposit," and also for those who furnish materials for such work; *Provided*, that two or more lodes, worked through the same opening, shall be considered one mine, and that the law shall not apply to mines worked under a lease. Section *six* provides that the lien in favor of sub-contractors, material men, and workmen shall cover the property upon which the work was done, or for which materials were furnished, and authorizes their payment by the owners on service of copy of the statement, and in case of failure to pay by the owners, gives the sub-contractors, etc., a right of action against the owners. The same section forbids payments in anticipation of liens, declares a forfeiture of rights for making excessive and fraudulent claims, and attachments of money due the contractor,

pending the proceedings to enforce a lien. By Section *seven* the mechanic's or miner's lien is given priority over all mortgages and other liens unrecorded at the commencement of the work. By Section *eight* the lienor is required to commence an action to enforce the lien within six months. Section *nine* prescribes the manner of enforcing the lien in a court of competent jurisdiction by petition and summons as in chancery suits, publication of notice for three weeks in a newspaper, or by posting where there is no newspaper in the county, to bring in all parties holding or claiming liens. All parties not appearing in response to the notice will be deemed to have waived their liens. Judgment may be rendered on all claims brought in, and the property sold to satisfy the judgment in favor of the lienors. Sections *ten* and *eleven* merely preserve the rights of action parties would have independent of the lien law, and require the entry of satisfaction on payment of debt and costs, under a penalty of $20 a day for refusal to make the entry on request of the party paying. By Section *twelve* it is provided that assignees, being creditors of the same class as the assignors, may claim and hold and enforce their liens for the amount of their own and assigned claims.[3] By an act amending the foregoing[4] it is provided, in Section *one*, that subcontractors, etc., may give notice to the owners of an intention to perform work or furnish materials of an estimated amount, before beginning, with like effect as though given at the completion of the work, or furnishing materials upon having the same recorded; or he may give such notice and have it recorded after the beginning of the work. But by Section *two* the filing of statement is still required; the notice before completion is optional with the lienor. By Section *three* the requisite notices *must be recorded.* By Section *four* notices may be *served upon agents* where the owners are non-residents,

and in the absence of such agents, by posting on the property. By Section *five* the contractors and all parties interested in the property are to be made parties defendant; also requiring the publication of notice, as in Section 9 of the act of 1872.[5] Section *six* provides that the lien or liens, singly or in the aggregate, of sub-contractors, etc., shall not exceed the amount due the original contractor. Section *seven* provides that where notice is given according to Section 1, and the work or materials are not done or furnished, or are paid for, satisfaction or a withdrawal of the notice shall be entered on the record within five days after notice from the owner, or for failure forfeit $20; for the first refusal, $50; and for each subsequent refusal, $100.[6] By a still later act,[7] most of the provisions of the foregoing statutes are re-enacted, and the acts themselves expressly repealed with a saving clause of all rights and remedies which accrued under the repealed statutes, and all suits and proceedings pending at the time of repeal. The most important changes are the forms of notices in Section *two;* the requirement that sub-contractors, material men, and laborers (miners) shall serve the notice on owners or post the statement before five o'clock p. m. of the Saturday following completion of the work, giving forms to be substantially followed for material men, sub-contractors, and mechanics or laborers, respectively. By Section *five* the "notice of claim" may be filed by sub-contractors, etc., at any time within forty days after work done or materials furnished, giving the form of such notice. By Section *ten* it is provided that if any contractor or sub-contractor deny the validity of any claim stated, he may bring an action in a court of competent jurisdiction making the owners and lienors parties defendant, in which suit the rights of the parties may be adjudicated; or the lienors may, in their action to enforce the lien, make the contractor or

sub-contractors parties defendant with the owners, and the former, in their answer, may deny the validity of the claims stated. Section *twelve* provides for suits to enforce liens by bringing in all the claimants; and in case the amount for which the property is sold on execution is insufficient to satisfy the claims in full, it is to be distributed *pro rata*, and judgment is entered for the amount unsatisfied in each case. Section *fifteen* provides for the aggregation of accounts by assignment, so as to make up the necessary amount of twenty-five dollars, and permits the assignee to recover the whole amount. Section *sixteen* includes *surveyors of mines* as entitled to liens for their services. By this act, which is the lien law now in force, the provisions in Section 6, as to forfeiture for fraudulent statement, and attachment are omitted. So, also, is the provision in Section 1 of the amendatory act of 1876, as to notice prior to completion of the work or furnishing materials. The penalty provided in Section 7 of the amendatory act for failing or refusing to withdraw notice of claim recorded prior to commencement, is no longer applicable under the new law. Beyond this the law is substantially the same as it was prior to the act of 1881.[8]

[1] Ch. lix.
[2] Session Laws, 1872.
[3] General Laws, p. 587.
[4] An act to amend an act entitled "An act to secure liens to mechanics and others, and to repeal all other acts in relation thereto," approved February 9, A.D. 1872.—Session Laws, 1876.
[5] *Supra.*
[6] General Laws, p. 593.
[7] An act to secure liens to mechanics and others, and to repeal all other acts in relation thereto, approved February 12, 1881.
[8] Session Laws, 1881, p. 168.

§ 261. Limitations.[1]—By "an act limiting the time for bringing actions respecting real estate,[2]" it is provided

in Section *one* that peaceable and undisputed possession for five years, under claim or color of title, made in good faith, and the payment of legally assessed taxes on the mining claim, shall raise a conclusive presumption of title in the possessor, whether such possession and payment of taxes were by himself or his grantors. By Section *two* it is provided that the mere payment of taxes for this period, upon unoccupied claims, or the improvements thereon will suffice, where the claim is made in good faith. And the rights of purchasers, devisees and decedents under the taxpayers are the same as by the preceding section; *Provided*, some one having a better paper title has not paid the taxes for one or more of the five years which constitute the adverse holding. By Section *three* the two preceding sections are rendered inapplicable to lands or tenements owned by the United States, except as to possessory rights to mining claims; to claims held or owned by persons resting under the disabilities of infancy, insanity, or imprisonment; *Provided*, that an action be brought for the recovery of the mining claims within one year after removal of the disability, and where the land is unoccupied, reimburse the payer of the taxes, with interest at 25 per cent. per annum; and to mining claims relocated on account of forfeiture under the provisions of the act of Congress of May 10, 1872. By Section *four* it is provided that the defendant in possession may plead the statute in bar of a recovery by plaintiff in all actions at law or in equity, excepting actions of ejectment.[3] But a failure to plead the statute will be deemed a waiver of its benefits.[4]

[1] Ch. lx.

[2] Sess. Laws, 1874.

[3] This action abolished as a distinct form of proceeding, though the action for the recovery of possession of real estate serves the same purpose.—*Code.*

[4] *Gen. Laws*, p. 600.

§ 262. **Ore.**[1]—An act to facilitate the recovery of ore taken by theft or trespass—to regulate *the sale and disposition of the same, and for the better protection of mine owners*,[2] provides in Section *one* that persons engaged in milling, sampling, concentrating, reducing, shipping or purchasing ores, shall keep a book, in which shall be entered the name of the party on whose behalf the ore is delivered; the name of the teamster or packer, and the owner of the train or pack-train by which it is delivered; the weight or amount of each lot; the name and location of mine or claim, and the date of delivery. By Section *two*, that parties from whom ore has been stolen, having a present interest in the ore, upon making affidavit to the facts before a justice of the peace or police magistrate in the state, on presenting a certified copy of the affidavit, may examine the entries in such book for the fifteen days next preceding the filing of the affidavit. Section *three* of the act provides in substance that for a violation of the spirit of the preceding section so as to defeat the purposes of the act, the party so offending, whether a person or corporation, shall be subject to a penalty to be paid to the party aggrieved, of not less than fifty, nor more than $300, and in addition an action for damages sustained by reason of the failure of duty, and renders a false entry in the books, *prima facie* evidence that it was wilfully made. By Section *four* it is provided that neglect or failure to make the necessary inquiries shall not excuse a failure to make the proper entries in the book. By Section *five* it is provided that any person knowingly purchasing or contracting for ores, taken from a mine or claim contrary to the penal laws of the state, shall be considered as an accessory after the fact, and subject to the same punishment as the principal. By Section *six* the persons or corporations dealing in ores mentioned in

the first section, for keeping or using false or fraudulent scales or weights for ascertaining the quantity of ore, or false or fraudulent assay scales or weights, knowing them to be false, are subjected to penalty of not more than $1,000 or less than $100, or imprisonment for not more than one year, or both such fine and imprisonment, at the discretion of the court. By Section *seven* the same penalties are denounced against the same class of dealers in ores, who knowingly alter or change the true value of ores delivered, substitute other ores, or deliver a false bill or certificate of purchase that fails to show the correct weight, assay value and total amount paid for any lot or lots of ore. Section *eight* makes the stealing, removing or concealing, or breaking or severing with intent to steal or fraudulently conceal or remove any ore, by any person, lessee, licensee or employe, a felony, punishable as grand larceny.[3]

1 Ch. lxxiii.
2 Approved February 7, 1877.
3 Gen. Laws, p. 671.

§ 263. **Public lands.**[1]—By Section *seven* of this chapter, which is intended to define the rights of occupants of public land, it is provided that where land is held for other than mining purposes under a recorded declaration, all lodes or diggings shall be excepted and subject to occupancy and enjoyment for mining purposes. Section *eight* gives a right to bring certain forms of action, including *forcible entry and detainer*, etc., and by Section *twelve* the provisions of Section 8 are made applicable to mining claims, with the proviso that the citizens of a mining district may declare abandonment a forfeiture of *all rights* previously claimed. Section *fifteen* provides *that the* owner of improvements on public land held for *arable*, building, milling or other legitimate purposes,

may demand a bond in double the value of such improvements, to be approved by a justice of the peace of the township, from any one demanding the right to mine on such premises, conditioned that such person will pay all damages accruing to such improvements from such mining operations. Section *sixteen* provides for the hearing of testimony by the justice of the peace as to the value of the improvements. Section *seventeen* provides for the justification of the sureties. Section *eighteen* allows the owner of the improvements to make a weekly demand for compensation from the obligees in the bond as the mining progresses.[2]

[1] Ch. lxxxiii; Rev. Stat., Ch. lxxii.
[2] Gen. Laws, p. 713.

§ 264. **School of Mines.**[1]—The act incorporating the "School of Mines" at Golden, fixes the number of trustees at five, designates the trustees for the first year, prescribes the oath of office, their powers and duties, declares the object of the school, authorizes the procurement of machinery, etc., enumerates the officers, provides for taxation in aid of the school, together with numerous other provisions for the management of the institution.[2] This act was amended by repealing Section *twelve*, which provided a tax of one-tenth of one mill on the dollar, and prescribing a tax of one-fifth of one mill for the support of the school for the years 1879–80.[3] This section was afterwards so amended as to require the tax to be levied and collected annually.[4] Section *six* of the act was also amended, declaring the objects of the school to furnish the same instruction as in other high grade technical schools, and confer degrees.[5]

[1] Ch. xci.
[2] *Gen. Laws, p. 803.*
[3] *Sess. Laws, 1879, p. 158.*
[4] *Sess. Laws, 1881, p. 220.*
[5] *Sess. Laws, 1881, p. 219.*

§ 265. **Weights and measures.**[1]—Section *three* of this chapter provides with respect to the measurement of water, that "water sold by the inch by any individual or corporation, shall be measured as follows, to-wit: Every inch shall be considered equal to an inch square orifice under five inch pressure, and a five inch pressure shall be from the top of the orifice of the box put into the banks of the ditch to the surface of the water; said boxes, or any dot or aperture through which such water may be measured, shall in all cases be six inches perpendicular inside measurement, except boxes delivering less than twelve inches, which may be square, with or without slides; all slides for the same shall move horizontally, and not otherwise; and said box put into the banks of ditch shall have a descending grade from the water in ditch of not less than one-eighth of an inch to the foot."[2]

1 Ch. cii., Rev. Stat. lxxxix.
2 Gen. Laws, p. 926.

CONSTITUTIONAL PROVISIONS.

§ 266. **Taxation.**—By Section *three* of Article X, of the Constitution, mines and mining claims bearing gold and silver and other precious metals are exempt from taxation for ten years from the adoption of the constitution.[1] From this exemption is expressly excepted "the net proceeds and surface improvements" of mines. The attempt to tax the net proceeds of mines has been made, but it is found that though not exempt the absence of necessary legislation leaves them practically exempt. The constitution is not self-enforcing, and the nature of the property is such that it cannot be taxed under the general revenue law.[2]

1 *1876.*
2 *See ante,* Ch. xiv., § 157 n. 8, "Taxation."—Opinion of Judge HELEM.

§ 267. **Irrigation—Water rights.**—Article XVI of the constitution is devoted to *mining and irrigation*. Section *one* requires the appointment of a commissioner of mines. Section *two* requires the legislature to provide for the ventilation of mines, and to prohibit the employment in mines of children under twelve years of age. Section *three* authorizes drainage laws. Section *four* authorizes the establishment of a school of mines, under state patronage. Section *seven* gives a right of way across public and private lands to conduits for carrying water for mining and other purposes, upon payment of just compensation. Sections *five*, *six* and *eight* refer to water rights; declaring natural streams to be public property; that the right of appropriation shall never be denied; recognizing priority of appropriation as giving the better right; giving the preference to water used for domestic purposes when there is not enough for all, and authorizing the legislature to fix maximum rates to be charged for water.[1]

[1] Gen. Laws, p. 71.

IV. DAKOTA.[1]

§§ 268-85. LOCATION AND SIZE OF LODES AND MINING CLAIMS —RECORDING.

§§286-9c. SURVEY OF DISPUTED CLAIMS—LIMITATIONS—INJUNCTION.

SECTION 268—Length of lode claims.
269—Width of lode claims.
270—Discoverer to record claim.
271—When certificate void.
272—Manner of locating.
273—Marking surface boundaries.
274—Requisites of location.
275—Time discoverer has to perform labor.
276—Certificate construed to contain.
277—Claim not beyond exterior lines.

[1] *Rev. Code 1877, Ch. xxxi.*, p. 159.

SECTION 278—Claims subject to right of way.
279—Owner may demand security from miner.
280—Filing amended certificate.
281—Work performed annually.
282—Affidavit of labor.
283—Relocating abandoned claims.
284—One certificate, one location.
285—Fee for recording.
286—Disputed claims—Survey of mine—Limitations.
287—Injunctions.
288—Location and notice of claim.
289—Recording of claims.
289*a*—Destruction of notice—Misdemeanor.
289*b*—Rights of way and easements.
289*c*—Water rights.

§ 268. **Length of lode claim.**—SEC. 1. The length of any lode claim hereafter located within this territory may equal, but shall not exceed, 1,500 ft. along the vein or lode.

§ 269. **Width of lode claims.**—SEC. 2. The width of lode claims shall be 150 ft. on each side of the center of the vein or crevice; *Provided*, That any county may, at any general election, determine upon a greater width, not exceeding 300 ft. on each side of the center of the vein or lode, by a majority of the legal votes cast at said election; and any county, by such vote at such election, may determine upon a less width than above specified; *Provided*, That not less than 25 ft. each side of vein or lode shall be prohibited.

§ 270. **Discoverer to record claim.**—SEC. 3. That the discoverer of a lode shall, within twenty days from the date of discovery, record his claim in the office of the register of deeds of the county in which such lode is situated, by a location certificate, which shall contain: (1) The name of the lode. (2) The name of the locator. (3) The date of location. (4) The number of feet in length claimed on each side of the discovery shaft. (5) The number of feet in width claimed on each side of the vein or lode. The general course of the lode as near as may be.

§ 271. **When certificate void.**—SEC. 4. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location. the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

§ 272. **Manner of locating.**—SEC. 5. Before filing such location certificate the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined mineral vein or lode; second, by posting at the point of discovery, on the surface, a plain sign or notice containing the name of the lode, the name of the locator and the date of the discovery; the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode; third, by marking the surface boundaries of the claim.

§ 273. **Marking surface boundaries.**—SEC. 6. Such surface boundaries shall be marked by eight (8) substantial posts, hewed or blazed on the side or sides facing the claim, and sunk in the ground, to-wit: one at each corner, and one at the center of each side line, and one at each end of the lode. Where it is impracticable, on account of rock or precipitous ground, to sink such posts, they may be placed in a monument of stone.

§ 274. **Requisite of location.**—SEC. 7. Any open cut, cross cut or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten (10) feet in along the lode, from the point where the lode may be *in any manner discovered*, shall be equivalent to a discovery shaft.

§ 275. **Time discoverer has to perform labor.**—SEC. 8. The discoverer shall have thirty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon.

§ 276. **Certificate construed to contain.**—SEC. 9. The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof; and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of such lines extended vertically, with such parts of all lodes or ledges as continue, by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode.

§ 277. **Claim not beyond exterior lines.**—SEC. 10. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or, as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior.

§ 278. **Claims subject to right of way.**—SEC. 11. All mining claims now located, or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes; or of any tramway or pack trail which is now in use, or which may be hereafter laid out across any such location: *Provided, always*, That such right of way shall not be exercised against any location duly made and recorded, and not abandoned prior to the *establishment* of the ditch, flume, tramway, or pack trail *without* consent of the owners except by condemnation.

as in case of land taken for public highways; parol consent to the location of any such easement, accompanied by the completion of the same over the claim, shall be sufficient without writing: *And, provided further*, That such ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise.

§ 279. **Owner may demand security from miner.**—SEC. 12. When the right to mine is, in any case, separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused, may enjoin such miner from working until such security is given. The order for injunction shall fix the amount of bond.

§ 280. **Filing amended certificate.**—SEC. 13. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this act, such locator or his assigns may file an additional certificate subject to the provisions of this act; *Provided*, That such location does not interfere with the existing rights of others at the time of such relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under the previous locations.

§ 281. Work performed annually.—SEC. 14. The amount of work to be done or improvements made dur-

ing each year to hold possession of a mining claim, shall be that prescribed by the laws of the United States, to-wit: one hundred dollars annually.

§ 282. **Affidavit of labor.**—SEC. 15. Within six months after any set time or annual period herein allowed for the performance of labor or making improvements upon any lode claim, the person on whose behalf such outlay was made, or some person for him, shall make and record an affidavit in substance, as follows:

TERRITORY OF DAKOTA, } ss.
County of ———. }

Before me the subscriber personally appeared, ————, who being duly sworn, says at least ——— dollars' worth of work or improvements were performed or made upon (here describe the claim or claims, or part thereof), prior to the —— day of ————, A. D. 18—, situate in ——— mining district, county of ————, Territory of Dakota. Such expenditure was made by or at the expense of ————, owner of said claim, for the purpose of holding said claim.

(Jurat.) (SIGNATURE.)

And such certificate when recorded in the office of the register of deeds of the county wherein such claim is located, shall be *prima facie* evidence of the performance of such labor.

§ 283. **Relocating abandoned claims.**—SEC. 16. The relocation of abandoned lode claims, shall be by sinking a new discovery shaft, and fixing new boundaries, in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut or adit to a sufficient depth to comply with sections five and seven of this chapter, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an andoned claim is taken, the location certificate must

state that the whole or any part of the new location is located as abandoned property.

§ 284. **One certificate, one location.**—SEC. 17. No location certificate shall claim more than one location, whether the location be made by one or several locators; and if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described; and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all.

§ 285. **Fee for recording.**—SEC. 18. The register of deeds shall be entitled to receive the sum of $1 for each location certificate recorded and certified by him, and shall furnish the locator or locators with a certified copy of such certificate when demanded, for which he shall be entitled to receive 50 cents.

§ 286. **Disputed claims—Survey of mine—Limitations.**—SEC. 19. In all actions in any district court of this territory, wherein the title or right of possession to any mining claim shall be in dispute, the said court, or the judge thereof, may, upon application of any of the parties to such suit, enter an order for the underground as well as surface survey of such part of the property in dispute as may be necessary to a just determination of the question involved. Such order shall designate some competent surveyor not related to any of the parties to such suit, or in anywise interested in the result of the same; and upon the application of the party adverse to such application, the court may also appoint some competent surveyor, to be selected by such adverse applicant, whose duty it shall be to attend upon such survey and observe the method of making the same; said second survey to be at the cost of the party asking therefor.

shall also be lawful in such order to specify the names of witnesses named by either party, not exceeding three on each side, to examine such property, who shall be allowed to enter into such property and examine the same; such court, or judge thereof, may also cause the removal of any rock, debris, or other obstacle in any of the drifts or shafts of said property, when such removal is shown to be necessary to a just determination of the question involved; provided, however, that no such order shall be made for survey and inspection, except in open court or in chambers, upon notice of application for such order of at least six days, and not then except by agreement of parties, or upon the affidavit of two or more persons that such survey and inspection is necessary to the just determination of the suit, which affidavits shall state the facts in such case, and wherein the necessity for survey exists; nor shall such order be made unless it appears that the party asking therefor had been refused the privilege of survey and inspection by the adverse party.

§ 287. **Injunctions.**—SEC. 20. The district courts, or any judge thereof, sitting in chancery, shall have, in addition to the power already possessed, power to issue writs of injunction for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property from which he or they may have been ousted by force and violence, or by fraud, or from which they are kept out of possession by threats, or whenever such possession was taken from him or them by entry of the adverse party on Sunday, or a legal holiday, or while the party in possession was temporarily absent therefrom. The granting of such writ to extend only to the right of possession under the facts of the case, in respect to the manner in which session was obtained, leaving the parties to their

legal rights on all other questions, as though no such writ had issued.[1]

[1] The foregoing sections are from Rev. Codes Dakota (1877), Ch. 21, p. 159.

V. IDAHO.

SECTION 288 —Location and notice of claim.
289 —Recording of claims.
289*a*—Destruction of notice—Misdemeanor.
289*b*—Rights of way and easements.
289*c*—Water rights.
289*d*—Miners' liens—Sub-contractors, journeymen, laborers, material-men.
289*e*—Same—Contractors, preparation of ores, superintendents, etc.
289*f*—Same — Superstructures and improvements included.
289*g*—Exemptions from execution.
289*h*—Limitation of actions.
289*i*—Rules and customs control.

§ 288. **Location and notice of claim.**—Locators of mining claims shall, at the time of location, place a stake or post, not less than four inches square or in diameter, at each end of the ground claimed, and a similar stake at each corner, which stakes must be four feet high. To one of the center end ones must be attached the notice of location. The notice shall contain the date of location, name of locator and of claim, the quantity in feet along the ledge or lode, and the width claimed from the middle of the vein; also a description of the locality of the claim as near as possible, by reference to surrounding landmarks. When stakes or posts cannot be conveniently had, monuments of stone will suffice, but the notice in either case must be conspicuous. Three hundred feet may be claimed on each side of the middle of the vein or lode, but the original number of feet staked *out shall not afterwards* be increased so as to affect the *rights of others.*

§ 289. **Recording of claims.**—Claims are to be recorded within fifteen days from the time of posting notice in the district in which they are located, or at the nearest office to the claim. Recorders of counties may appoint deputy recorders at the request of ten or more locators, or upon failure so to do the locators may elect one temporarily. Within five days after presenting notice for record, one of the locators shall appear before the deputy and make affidavit in writing on, or attached to, the notice.[1] The notice filed for record must be substantially a copy of the notice posted on the claim, and it shall be the duty of the deputy recorder to record the same in a book kept for that purpose. He shall transmit to the county recorder at least once a month all the notices so filed.

[1] FORM OF AFFIDAVIT.

TERRITORY OF IDAHO, } ss.
COUNTY OF ——— }

I, ——— ———, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the ——— ledge, lode or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this territory, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply, in respect thereto, with the requirements of said laws.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———

§ 289*a*. **Destruction of notice—Misdemeanor.**—Any person taking down or destroying any stakes, posts, or monuments, or taking down, destroying, or obliterating any notices, shall be deemed guilty of a misdemeanor, *punishable* by fine not exceeding $100, or imprisonment *in county* jail not exceeding six months, or both.[1]

[1] *Laws of* 1881, pp. 262, 263, 264, 265.

§ 289*b*. **Rights of way and easements.**—Whenever any mine or mining claim is so situated that a right of way over adjoining premises is necessary, for the more convenient enjoyment of the same, the owner or owners thereof shall be entitled to such right. Sec. 3. If it cannot be had by agreement with the owner or owners of the land over or across which the right of way is sought, the party entitled to it may present his petition praying for an award of the right, to the judge of the district court within and for the county in which such right of way, or some part thereof sought to be enforced, is situated. Upon filing the petition the clerk shall issue a citation to the owners of the land named in the petition to appear before the judge, at a day named (not less than ten after service), and show cause why such right of way should not be granted. Upon a hearing of the case, if the judge is satisfied that the right of way should be granted he shall make an order to that effect, and appoint three commissioners to assess the damages resulting to the lands affected by such order. The judge may set aside the report of the commissioners for good cause shown. Appeals from the report of the commissioners may be made and prosecuted by any party interested, in the proper district court, but appellant must serve written notice on appellee, and file a bond, with sureties, to be approved by the clerk, in the amount of the assessment appealed from, and conditioned that appellant shall pay all costs awarded the appellee, and abide by the judgment which may be rendered in the cause. Appeals bring before the appellate court, only the property and the amount of damages, and are tried by the court or before a jury as other cases. The prosecution of an appeal shall not prevent or delay the appellee in the use and enjoyment of his right of way, provided he tenders the owners of the land the sum as-

sessed as damages by the commissioners and files a bond with good and sufficient sureties, approved by the clerk, in double the amount appealed from, and conditioned for the payment of the amount which may be recovered by appellant in the action. If the appellant recover $50 more damages than the commissioners have awarded, or the appellee shall offer to allow judgment to be taken against him, the appellee shall pay costs, otherwise the appellant. If the applicant for the right of way shall have tendered to the parties owning or occupying the lands a sum equal to or more than the amount of damages recovered by the defendant or defendants, then they shall pay all the costs and expenses of the proceedings. These provisions do not apply to the counties of Boise, Idaho, Nez Perce, and Shoshone.[1]

1 Laws of 1877, pp. 70, 71, 72, 73; Laws of 1881, p. 266.

§ 289c. **Water rights.**—The right to the use of flowing water may be acquired by appropriation, and priority of time secures priority of right. The appropriation must be in good faith, and when once perfected may be used for any beneficial purpose. The place of diversion may be changed or the course of the stream extended, provided the vested rights of others are not infringed. Written notice of appropriation and diversion must be posted at a conspicuous point, and a copy of the notice furnished to the proper officer of the county for record. The appropriator must commence the intended diversion within sixty days after notice is posted, and continue the work to completion without unnecessary delay. "Complete diversion" is the conducting of the waters claimed to the place of intended use, followed by the actual beneficial use thereof. When the appropriation is perfected the right relates back to the time of posting notice, but no one is liable to the appropriator for the use of the

water before a "complete diversion" thereof is effected. Appropriators of streams desiring to make a diversion are entitled to a right of way over adjacent lands to the place of intended use. Upon a refusal to grant this privilege by the owners of such lands it may be obtained by a petition to the county commissioners.[1]

[1] Laws of Idaho, 1881, pp. 267-271.

§ 289*d*. **Miners' Lien — Sub-contractors, journeymen, laborers, material men.**—SEC. 12. Every sub-contractor, journeyman, laborer, or other person, performing labor or furnishing materials for any contractor in or upon any quartz claim, ledge or mine, in working in the same, or in the improvement or development thereof, in the completion or performance of any contract entered into by any person in this territory, every such person or persons so performing such labor or furnishing such material shall have a lien upon all the interest in such quartz claim, ledge, or mine, of the person or persons employing him or them, or purchasing such materials, with the improvements thereon and the appurtenances thereto belonging; and also, upon all the interest of the person or persons for whom such person or persons acts as agent, or the owner or owners for the value of such work or labor or materials furnished; and all the provisions of this act[1] shall apply in respect to recording, recovering, and enforcing such liens provided for in this section: *Provided*, the person or persons claiming such lien shall, within thirty days after the performance of such labor, or furnishing such materials, give notice in writing to any person or persons, agent or agents, owner or owners, and shall, within forty days, file their lien in other respects as provided by this act.

[1] *General Lien Law.*

§ 289e. **Same—Contractors—Preparation of ores—Orehaulers—Superintendents, etc.—Mechanics and Artisans.**—SEC. 13. When any person or persons shall do or perform any work or labor in or upon, or for any quartz claim, mine, or ledge, in working the same, or in the improvement or development thereof; or in the preparation of the ores thereof for reduction; or in the hauling of the ores thereof; or shall perform labor or service as superintendent, manager, or foreman of any mine or ledge, or shall perform labor as a mechanic or artisan therefor, such person or persons shall have a lien upon all the interests in such quartz claim, ledge, or mine, of the person or persons employing him or them, or purchasing such materials, together with the improvements thereon and the appurtenances, for the value of such work, labor or services, or materials furnished. and all the provisions of this act, respecting the filing, recording. and recovering, and enforcing mechanics' liens are made applicable to this section: *Provided*, the person or persons, claiming such liens shall, within sixty days after the completion of such work or labor, or rendering said services, or furnishing said materials, file their lien, in other respects, as provided by this act.

§ 289f. **Same—Superstructures and improvements included.**—SEC. 14. This act shall be so construed as to include in its provisions bridges, ditches, flumes, aqueducts, to create hydraulic power for mining purposes, and all improvements on mining claims.[1]

[1] Laws 1874-5, p. 615.

§ 289g. **Exemptions from execution.**—The cabin or dwelling of a miner not exceeding in value $500; also his sluices, pipes, hose, windlasses, derrick, cars, pumps,

and tools, not exceeding in value $200, are exempt from levy and sale under execution.[1]

[1] Code of Civil Procedure, subd. 5, § 440; Gen. Laws, p. 99.

§ 289*h*. **Limitation of actions.**—The period of limitation of actions for the recovery of mining claims is five years, as in other actions for the recovery of real estate.[1]

[1] Code Civ. Proc. § 143, p. 27.

§ 289*i*. **Rules and customs control.**—In actions concerning mining claims, the rules and customs of the bar or diggings are admissible in evidence and govern the decisions of courts, when not in conflict with the general law.[1]

[1] Code Civ. Proc. § 486, p. 112.

VI. MONTANA.

SECTION 290 —Discovery and record of quartz claims.
291 —What must be discovered.
292 —Length and width of lode claims.
293 —Prior discoveries and locations.
294 —Removal of stake or monument—Destruction of notice.
295 —Repeal.
296 —Customs—Limitations.
296*a*—Aliens.
296*b*—Rights of way—Condemnation.
296*c*—Tunnels.
296*d*—District records.
296*e*—Taxation of mines.
296*f*—Sales of interests of deceased persons.
296*g*—Penal provisions—Weights and measures—Failure to account—Unguarded excavations.

§ 290. **Discovery and record of quartz claims.**—SEC. 1. A discoverer of a claim upon a vein or lode of gold, silver, cinnabar, lead, tin, copper, or other valuable deposits is required, within twenty days, to make a

declaratory statement thereof on oath, and file the same in the county recorder's office, describing the claim as required by the laws of the United States.

§ 291. **What must be discovered.**—SEC. 2. A valid discovery of quartz or ore must be in a crevice with at least one well defined wall.

§ 292. **Length and width of lode claims.**—SEC. 3. The size of a claim is limited as in the act of Congress of May 10, 1872—not more than 1,500 feet in length, and not more than 300 nor less than 25 feet in width on each side of the center of the vein, saving rights acquired by recording claims prior to the act.

§ 293. **Prior discoveries and locations.**—SEC. 4. Lode claims previously discovered and located according to law, where the possessory rights have been preserved according to the law in force, may be conformed as to the length and width, to the provisions of this statute, provided it will not conflict with the intervening rights of other locators, by a record which shall show that the owners of such claims elect to take the benefits of the new law.

§ 294. **Removal of stake or monument—Destruction of notice.**—SEC. 5. The removal of a stake or monument, or the defacing, obliteration, or destruction of a notice, is punishable by a fine not exceeding one hundred dollars, or imprisonment not exceeding one year, or both such fine and imprisonment.

§ 295. **Repeal.**—SEC. 6. All previous conflicting acts repealed.[1]

[1] App. Feb. 11, 1876. Laws 1876, p. 127.

§ 296. **Customs—Limitations.**—In actions respecting *mining* claims, the customs, usages or regulations in

force at the bar or diggings may be proved, and when not in conflict with the laws of the territory must govern.[1] The period of limitations for the recovery of all mining claims, except lodes, is one year.[2]

[1] Laws 1877, p. 139.
[2] Laws 1877, p. 48.

§ 296*a*. **Aliens**—Are not allowed to own mining claims or acquire any interest therein, nor to the profits arising therefrom. Provision is made where aliens set up claims inconsistent with the statute, that the mining claims or interests held by them shall be forfeited to the territory, and a suit may be instituted for the purpose of obtaining judgment of forfeiture. But aliens, by declaring their intentions to become citizens, at any time before judgment of forfeiture, will remove their disabilities.[1]

[1] Coldfied Statutes 1871-2, p. 593.

§ 296*b*. **Rights of way—Condemnation.**—Substantially the same provisions as to the right of ingress and egress to mines and mining claims, and the condemnation of ways for roads, ditches, flumes, etc., as in the *California* statute,[1] are prescribed for claims, whether patented or not, and render other claims, patented and unpatented, servient to the easement. The statute is so voluminous, and its provisions so nearly identical with those of the California statute, that it would be useless to copy them here.[2]

[1] *Ante*, § 199, p. 272.
[2] Cod. Stat. 1871-2, p. 597. Rev. Stat. 1879, p.592.

§ 296*c*. **Tunnels.**—The location of a tunnel right is required to be recorded. Tunnel claims include 300 feet on each side, and have a right of way through other claims. One hundred feet of work must be performed annually. Tunnel claimants in addition to the ground

embraced in the tunnel and the claims located thereon, are allowed to claim 300 feet on each side of the entrance or mouth, for quartz or ore yards.[1]

[1] Cod. Stat., 524; Rev. Stat. 1879, p. 591.

§ 296*d*. **District records.**—It is made the duty of district recorders, to deposit their records in the office of the county recorder, and when so deposited, they become county records. The county recorders are subjected to penalties for failing to receive such records.[1]

[2] Rev. Stat. 1879, p. 591.

§ 296*e*. **Taxation of mines.**—Taxation of the net proceeds of mines is provided for, and in order to arrive at the amount, annual statements are required. Credit is given for expenditures, but no exemption of improvements. On failure of the owner to make the required statement, it becomes the duty of the assessor to make the assessment according to the best of his information and judgment. The assessable value of *mines* purchased from the government shall not exceed the purchase price. The assessor has power to examine books, etc., to ascertain the taxable product. There are the same provisions for equalization of taxes as apply to other property.[1] Unpatented claims are exempt.[2]

[1] Rev. Stat. 1879, p. 628.
[2] *Ibid*, p. 616.

§ 296*f*. **Sales of interests of deceased persons.**—Mines or interests therein of decedents may be sold by order of the probate court. There must be a petition for such order of sale, upon the filing of which is issued and served original process in the form of an order to show cause why the property should not be sold. Upon the hearing of the petition, no sufficient cause appearing to the contrary, an order of sale will issue, pursuant to

which the decedents' interest will be sold and the proceeds become part of the personal estate.[1]

[1] Art. iii., Ch. vii., Rev. Stat. 1879.

§ 296*g*. **Penal provisions—Weights and measures—Failure to account—Unguarded excavations.**—Any one knowingly keeping any false or fraudulent scales or weights for weighing gold or gold dust, is subject to punishment by a fine of not more than $1,000, nor less than $100, or imprisonment for not longer than one year, or both such fine and imprisonment, in the discretion of the court. An owner or manager of a quartz mill, arastra, furnace, or cupel, employed in extracting metals from ore, who neglects or refuses to account to and pay over the proceeds of ore received by him for treatment, is subject to a fine of not to exceed $1,000, or imprisonment not to exceed one year.[1] Running drifts or sinking shafts within twenty feet of a trail or road, without providing a fence or covering, to guard against accidents, is punishable by fine of not less than five nor more than fifty dollars, and renders the person so offending liable in damages to any person injured in consequence of the failure to cover or fence such excavations.[2]

[1] Cod. Stat., p. 308.
[2] Cod. Stat., p. 593.

VII. NEVADA.

SECTION 297—Formation of mining districts—Location of claims.
298—Recording claims.
299—Conveyance of mining claims.
300—Partition of claims.
301—Actions—Limitation of.
302—Condemnation of private property for mining purposes.
303—Corporations.
304—Same—Removal of officers.
305—Same—As tenants in common—Actions by for contribution.

SECTION 306—Taxation.
307—Taxation of borax mines.
308—Police regulations—Injuries to water companies' property—Security of persons and animals.

§ 297. **Formation of mining districts—Location of claims.**—A statute embracing these subjects was enacted, repealing all district laws, and exempting Storey county from its provisions. The act was quite comprehensive, embracing forty-seven sections, prescribing the manner of electing district officers, defining their powers and duties, and fixing their fees; also the manner of making locations, the extent of claims and what was necessary to hold the same.[1] But this was a short-lived statute. The repealing act, however, saved all rights acquired under it, and provided that where it had been adopted as the law of the district, it should so remain until repealed or amended, except the requirement to cause the record of claims to be made in the county recorder's office.[2]

1 Stat. 1866, p. 141.
2 Stat. 1867, p. 55. (Locations governed by district rules). Stat. 1862, p. 12, § 3.

§ 298. **Recording claims.**—In order the better to preserve the mining records, it has been somewhat recently enacted that in all mining districts in which the county seat is situated, the county recorder shall be *ex-officio* mining recorder, subject to the rules, regulations and compensation prescribed by district rules, and as such recorder, be responsible on his official bond for faithful performance of his duties. The act to take effect August 1, 1880.[1]

1 Stat. 1879, p. 80.

§ 299. **Conveyance of mining claims.**—The legality of the execution, acknowledgment, proof, form and record of instruments including conveyances, depended

upon the laws and customs in force in the district,[1] until it was enacted that conveyances of mining claims should be subject to the same rules and formalities and construction as conveyances of other real estate; providing, nevertheless, that previous conveyances should be construed as valid or otherwise between the parties, according to the lawful district rules in force at the date of their execution, and should be established and proved, as prescribed by such rules.[2] By a subsequent statute it was made lawful for minors over the age of eighteen, to convey any interest acquired in a mining claim; and when such conveyances had been made since July 1, 1867, in the absence of fraud practiced upon the minor, and where suits were not already pending in the courts of the state involving their validity, such conveyances were rendered valid and binding upon the grantors to convey their interests, without the power of revocation.[3] Mortgagees may perform acts to prevent a forfeiture, and recover reasonable compensation therefor.[4]

[1] Stat. 1861, p. 16.
[2] Stat. 1862, p. 12.
[3] Stat. 1869, p. 96.
[4] Stat. 1861, p. 21.

§ 300. **Partition of claims.**—Under the partition law it was provided that upon the report of commissioners appointed to partition mining claims, an affidavit might be filed by any of the tenants in common, or joint tenants, to the effect that a sale for cash would be injurious to them, when another commissioner should be appointed, who should parcel out the claim in the manner substantially as follows:[1] The proceedings laid down in the act by which the foregoing was repealed are not essentially different from those of the repealed statute, except that they follow almost as of course upon good cause shown by any of the parties in interest, and do not require the

appointment of additional commissioners or referees. The court fixes the time for division, not less than twenty nor more than forty days from the date of the order, except by consent of all parties. If two or more parties unite, they must notify the referees, and if they act separately must also give notice thereof, or will be deemed to have united. The division shall be by public auction, and the successful bidder shall be the one who offers to take the smallest part of the claim in proportion to his interest for first choice, and so on, until there shall remain but one party or parties united in interest, marking off to each bidder the amount selected by him, as the division progresses. The remaining party or parties shall have the residue.[2]

[1] Stat. 1861, p. 434.
[2] Stat. 1869, p. 246.

§ 301. **Actions—Limitation of.**—Actions may be maintained for possession,[1] or injury to mines,[2] against corporations or mining companies, by service on their president, secretary, cashier, or managing agent, or by publication. And in actions on contract may be against the company in the name in which the contract was made.[3] Actions may also be maintained by agricultural settlers against any one disturbing their possession, subject to the miner's right to extract the precious metals from mineral lands.[4] When the action is for possession of a mining claim, for which application for a patent has been made, it shall only be necessary that this fact appear, and that the parties claim the property, or some part thereof, to confer jurisdiction on the court to try the case and render judgment.[5] In actions for damages, by the owner of one mine against the owners of another, there may be an order for the *inspection and examination* under proceedings similar to those prescribed by the Col-

orado code.[6] The period of limitation for possessory actions is two years.[7]

1 Stat. 1873, p. 50.
2 Stat. 1862, p. 33.
3 Stat. 1862, p. 120.
4 Stat. 1864-5, p. 343.
5 Stat. 1873, p. 50.
6 *Ante*, § 234, Code Col., § 387.
7 Stat. 1861, p. 27; Stat. 1867, p. 85; Stat. 1869, p. 95.

§ 302. Condemnation of private property for mining purposes.—An act for the purpose of compelling the owner of real estate or other property to sell the same to another person or corporation needing the same for mining, milling, or other kindred purposes, at the purchaser's own price or one fixed by appraisers, or ultimately by a court or jury, who might determine that it was necessary to the convenience of the purchaser that he should have the property in question; and in the determination of which question it does not make any difference whether the original owner needs the property or not: provides that the costs shall abide the result of the suit, and be paid by the contumacious owner who refused to sell at the price offered, provided the court or jury determine that that was enough. In any event, the needy purchaser gets a deed to the property, on payment of the price awarded by the court or jury.[1] "For the encouraging of mining, milling, smelting and reduction of ores," an act was passed, repealing the foregoing and accomplishing the same result—involuntary transfer of the property—by originally commencing suit against the persons holding the property, without any previous offer to purchase. The right of action depends upon the necessities of the purchaser, he being engaged in the business to be encouraged. These facts, together with the name of the person or corporation petitioning; a

description of the property; and the names of those to be deprived thereof, as near as can be ascertained by reasonable diligence, all appearing in a verified petition filed in the office of the clerk of the district court, the action is properly commenced. All parties occupying, owning or claiming any interest in the property, whether named in the petition or not, become defendants. Orders in this proceeding may be made in term time or vacation. The petitioner shall use reasonable diligence to have all the defendants notified personally; failing in which, he may notify them by publication. If, upon the hearing, the court be satisfied that the lands, or any part thereof, are necessary or proper for any of the purposes mentioned, three commissioners shall be appointed, one of whom may be selected by the purchaser and one by the persons to be deprived, or any of them, to ascertain and assess the compensation. The commissioners or a majority of them may act. The purchaser may pay the amount fixed upon into court and take the property, where there is a conflict in regard to the title. Any one or more of the parties who may be dissatisfied with the result, may, within twenty days and after ten days' notice to the other parties, move to set aside the report and to have a new trial. The matter may, for good cause shown, be recommitted to the same or other commissioners, who shall be ordered to proceed in like manner as those first appointed; but not more than twice recommitted. At the expiration of twenty days, or such further time as may have been granted, all things being regularly and properly done, the court confirms the report, and upon paying the compensation, the same shall be recorded by the petitioner in the recorder's office. Costs are payable by petitioner, except when there is a motion for new trial which does not result in an increase of compensation of more than 10 per cent.,

in which event the defendant shall pay the costs. If the first attempt to deprive the defendant of his property is unsuccessful it may be repeated, and if the petitioner has taken possession without right the court or judge may allow him to retain possession, or he may be allowed to take possession during proceedings on paying a sufficient sum into court or giving security that he will pay the compensation awarded. If the person to be deprived be an infant, idiot or insane, the guardian, executor or administrator, as the case may be, shall be subject to process, judgment or decree, or without process, judgment or decree, may transfer the property to the petitioner, the sale being approved by the judge of the proper court. There are other provisions somewhat superogatory, but the manifest improvement in this over the act repealed, is the utter absence of the *jury*. It is to the carrying out of proceedings of this kind that juries are apt to interpose obstacles. This was doubtless the chief objection to the statute repealed. It would also be much more secure if there were a provision cutting off all right of appeal.[2]

[1] Stat. 1866, p. 196.
[2] Stat. 1875, p. 111.

§ 303. **Corporations.**—An act for the formation of corporations for mining and other purposes, approved December 20, 1862, was amended by a subsequent act[1] in many of its most important provisions, and Section 27 was, by the latter act, repealed. Section 26, requiring corporations heretofore formed in other states to remove their principal place of business to the territory, was disapproved and thereby rendered null by act of Congress of March 3, 1863.[2] Section *two*, of the act of 1864, has substantially the same provisions as to manner of incorporating a company as under the California statute.[3]

Section *three* requires security from the trustees, and provides for their removal from office. Section *four* requires not less than three trustees, resident stockholders, and provides that they may be removed by a two-thirds vote of the stockholders at a meeting called pursuant to the by-laws. It also prescribes an oath to be taken by incoming trustees; that elections shall be annual after the expiration of the time of the first incumbents, and the manner of filling vacancies in the board by election in case of deposition, and appointment in case of death or resignation. Section *five* gives stockholders power to prescribe, by by-law, the times of paying assessments, but in the absence of by-law may be called for by trustees. In case of delinquency, the sale of sufficient shares to pay assessments shall be made according to the by-laws, but at the office of the company, at public auction, to the highest bidder, after four weeks' published notice, the bidding being the same as under California statute.[4] Section *six* authorizes a change of capital stock. Section *seven* requires advertisement of removal of place of business in same county, and refiling certificate if removed to new county. It also provides that acts of old corporations shall not be invalidated, provided that within three months they publish the same for four consecutive weeks in the nearest newspaper. Section *eight* authorizes the payment of subscriptions in mining property, and does not require the capital stock to be all subscribed or paid in, but leaves the regulation of the manner and time of calling in assessments to the by-laws.[5] Both the foregoing acts were subsequently repealed by act of March 10, 1865. Section *one*, of this act, authorizes corporations for a variety of purposes, including mining, milling, and ditching.[6] Section *two* is the same as in the repealed act. Section *three* makes a certified copy of certificate of corporation *prima facie* evidence. Section *four* pre-

scribes the ordinary powers of corporations, and in addition, the power to purchase its own stock sold for delinquency, and legalizes previous purchases of the same. The provisions as to holding and control of such stock are the same as in the California statute.[7] Section *five* contains the same provisions as to election of trustees, their oath of office, deposition and filling vacancies, as were contained in Section 4 of the act of 1864 repealed,[8] except that the trustees are not required to be residents of the state.[9] Section *six*, providing for adjourned elections in case of failure on the day appointed, was amended by act of February 24, 1866, so as to authorize the call of a stockholders' meeting by an officer on request of holders of one-third the stock, in case the newly elected trustees fail to qualify within thirty days, to elect new trustees to fill the vacancy.[10] Section *seven* is that a majority will form a quorum of trustees, and a majority at the meeting may perform corporate acts. Section *eight* provides for first meeting of trustees being called by one of their number by personal notice to others, or by publication twenty days. Section *nine* provides that shares of stock, when so divided, shall be personal property, transferable by indorsement, and transfers to be entered on the company's books, to be valid except between the parties; may be transferred by a married woman as by a *femme sole*, and she may receive dividends in the same manner. Section *ten* contains the same provisions as to assessments, delinquency, sales of stock for non-payment of calls, etc., as Section 5 of the repealed act of 1864.[11] Section *eleven* provides for the representation of stock by guardians, trustees, and personal representatives. Section *twelve*, that owners of hypothecated stock may still represent the same, and vote as other stockholders. Section *thirteen* provides that in case of a declaration of dividends from the capital stock, or other-

wise than out of net profits, or the unlawful reduction of the capital stock, the trustees shall become personally, jointly, and severally liable to the corporation, or "in the event of its dissolution" to creditors, exempting trustees who cause their dissent to be entered at large upon the minutes, and those who were absent from the meeting, from such liability, and providing that the capital stock may be divided on dissolution after payment of debts.[12] Section *fourteen* limits the indebtedness to the amount of capital stock paid in, imposing upon the trustees under whose administration any excess occurs, the same liabilities, with the same exceptions, as in Section 13. Section *fifteen* prohibits the issue of circulating notes. Section *sixteen* requires the same list of stockholders to be kept for inspection, authorizes transcripts from the same, and makes such transcripts evidence, as in the California statute.[13] Section *seventeen* prescribes the penalty for breach of duty in failing to comply with provisions of Section sixteen, to be not less than one hundred nor more than one thousand dollars. Section *eighteen* authorizes a change of capital stock provided that it shall not be reduced below the indebtedness, without first paying the excess. Section *nineteen* provides that the change of capital stock shall be at stockholders' meeting. Notice of which containing the time and place of meeting, and the proposed change in amount, signed by at least a majority of the trustees, shall be published eight weeks. A two-thirds vote is necessary to make the change. Section *twenty* provides that when the change is so effected, a certificate of the fact, showing a compliance with all the legal conditions to such change shall be signed and verified by the chairman and secretary, and filed as required in case of the certificate of corporation. Section *twenty-one* makes the trustees of the corporation trustees both of creditors and stockholders in case

of dissolution. Section *twenty-two* authorizes the voluntary disincorporation of companies on a majority vote of the stockholders, and a petition to the district judge, eight weeks' publication, and a finding by the judge that the requisite preliminary steps have been taken, and claims against the company discharged. Section *twenty-three* is the same as Section seven of the act of 1864 repealed.[14] Section *twenty-four* is substantially the same as Section eight of the act of 1864 repealed.[15] Section *twenty-five* provides that mining corporations shall be governed by district laws, provided that expenditures in incorporating and procuring books shall be regarded as work done on the claim. Section *twenty-six*, that in case of disincorporation, the trustees shall convey to each stockholder his proportionate interest in mining claims owned by the company. Section *twenty-seven* is the repealing clause.[16] Section *twenty-eight* was supplied by a subsequent act, extending the provisions of the act to prior corporations.[17] Mining corporations have power, acting by a majority of the stockholders, to purchase and hold such mining property as they may deem meet.[18]

1 Feb. 19, 1864.

2 Stat. at Large, 37th Cong., p. 709.

3 *Ante*, § 184, *et seq.*

4 *Ante*, § 189.

5 Stat. 1864, p. 49.

6 Amended by act of March 1, 1866, to include "ore reduction." Stat. 1866, p. 165. Further amended so as to authorize mining companies to become stockholders in corporations formed for the purpose of constructing tunnels, shafts, or other work. Stat. 1867, p. 44. Subsequently amended as to matters not material here. Stat. 1869, p. 95.

7 *Ante*, § 184, *et seq.*

8 *Supra.*

9 This section amended. See *infra*, § 304. "Removal of officers."

10 Stat. 1866, p. 79.

11 *Supra.*

12 Amended March 3, 1866, by leaving out the words, "In the event of its dissolution." Stat. 1866, p. 188.
13 *Ante*, § 184, *et seq.*
14 *Supra.*
15 *Supra.*
16 Stat. 1864-5, p. 359.
17 Stat. 1866, p. 46.
18 Stat. 1866, p. 204.

§ 304. **Same—Removal of officers.**—Section 5 of the act of March 10, 1865, given in the next preceding section, was amended by adding thereto a provision for the removal of officers (including trustees by implication), which is similar to the California statute for the same purpose, except that in the California act *trustees* are not mentioned as subject to removal.[1] The other points of difference are that instead of the county judge, as in California, the district judge is petitioned and gives the notice of hearing. Instead of the meeting being conducted by a chairman and secretary of its own selection, it shall be conducted by the judge, who shall determine who has a right to vote; appoints the secretary and receives proofs. A vote of a majority of all the shares effects the removal, when an election to fill vacancies is held before the judge who furnishes the certificates of election.[2]

1 *Ante*, § 191.
2 Stat. 1875, p. 68.

§ 305. **Same—As tenants in common—Actions by for contribution.**—By an act for the "encouragement of mining," corporations owning an undivided interest in a mining claim might work the same, and recover from cotenants their proportionate share of the expenses. Previous to bringing the suit, notice of intention was required to be published for twenty days, except where personal service was had on the defendants, when only ten days' notice was necessary. The notice shall also

contain a specification of the amount expended and the amount due, On the trial proof was required of the necessity of the expenditure, the quantity of defendant's interest at the time of the expenditure, and the notification and failure to pay. The act provides that the expenditure in necessary development, as the proportion of a co-tenant or joint tenant, or the indebtedness assumed by the corporation in that behalf, should become a lien upon his interest which might be sold as provided for sales of real estate on execution, and might be redeemed as real estate is redeemed. The act was only intended to apply to companies in the territory.[1] This act was repealed,[2] by a statute more explicit and intelligible in its provisions, intended to serve the same purpose. By section *one* it is provided that "when three or more persons, owning or claiming as joint tenants, tenants in common, or co-parceners, a majority of the number of feet, shares or interests in any mining claim in this state, shall have formed, or shall hereafter form themselves into a corporation or organized association for the purpose of working and developing such mining claim, and shall actually proceed to work and develop the same," such corporation might proceed as in the act repealed to recover from their co-owners who failed to contribute their proportion of expenses. Any number of such co-owners might be joined as defendants, but might plead separately. The notice of intention to sue was fixed at three weeks. The summons is required to state the amount expended and the amount due from each defendant. The procedure prescribed for other civil actions, so far as applicable, are to apply to suits under the act. In addition to the lien upon the interest provided for in the repealed act, it is here provided that on obtaining judgment against defendant plaintiff shall have a special execution against the

interest of defendant in the mine, but against no other property. The sale under execution is to be absolute, and the purchaser entitled to immediate possession. The repealing clause provides that rights of action already accrued shall be brought under the new act, saving the rights of those who had already instituted suits under the repealed statute.[3]

1 Stat. 1864, p. 53.
2 Act of March 7, 1865.
3 Stat. 1864–5, p. 228.

§ 306. **Taxation.**—The tax law of March 9, 1865, prescribes, in section *ninety-nine*, that an *ad valorem* tax of 1 per cent. upon 75 per cent. of all ores, quartz or mineral from which gold or silver is extracted, after first deducting from the gross value $20 per ton for expenses of extracting, is to be assessed and collected every three months, in gold or silver coin, for state and county purposes. By a subsequent amendment, the requirement that the taxes should be paid in coin was omitted.[1] This section was further amended, requiring ores to be assessed at their value when severed from the mine and deposited on the surface. A deduction of $18 per ton is allowed when the ore is treated without roasting, and when worked by the Freiburg or roasting process, or by smelting process, $40 per ton.[2] Section *one hundred* provides that ore producers who ship the product out of the state shall establish its value for taxation, to the satisfaction of the assessor. On failing to do so, it shall be assessed at $500 per ton, without deduction. By section *one hundred and one*, the periods during which the assessor shall make diligent inquiry for mines, the names of owners and the quantity of ore produced, are divided into—between the first Mondays of January and February; April and May; July and August; October and November. He is required to demand of each person engaged in mining, or

from their managing officer or agent, if a corporation, a sworn statement of the next preceding three months—including the moneys received and the number of tons of ore produced, also the number shipped from the state, and the value thereof. He may examine books, and in case of refusal to make the statement or give free access to the books, the one refusing shall be held guilty of a misdemeanor, and punished by a fine of not less than $100 nor more than $500, or imprisonment in the county jail for not less than twenty days nor more than three months, or both such fine and imprisonment. Section *one hundred and two* authorizes the assessor to make the assessment from such information as he can obtain, when it is not furnished by the proper parties, as required by law. By section *one hundred and three*, owners and managing agents of mills, etc., where ores are treated, are required to keep accounts of all ores received, with the names of mines from which produced, and the amount and value of bullion derived therefrom, which shall be open to inspection by the assessor, unless on demand such owner or managing agent will furnish a sworn statement. On failure or refusal to furnish the statement or give access to the books, the owner or agent shall be held for misdemeanor, punishable by fine and imprisonment, as in the next preceding section. By section *one hundred and four* it is made the duty of the assessor, on receiving such statement or information, to transmit a certified statement of the result to the assessor of the county where such claim is located, if in any other county than the one in which the mill is situated. Section *one hundred and five* requires assessments to be made in the county in which the mine is located. Section *one hundred and six* requires the assessor, on or before the second Monday in February, May, August and November in each year, to prepare an "assessment roll of the proceeds of the

mines," alphabetically arranged, the following form of which will be sufficiently indicative of its contents:

QUARTERLY ASSESSMENT ROLL OF THE PROCEEDS OF THE MINES FOR THE QUARTER ENDING ——.

NAME OF OWNER, COMPANY, ETC.	Description of Location of Mine.	No. of Tons Extracted for the three months ending ——.	Value per Ton.	Total Value.	Am't upon which the Tax is Levied.	State Proportion of Tax.	County Proportion of Tax.

In giving the assessed value per ton, that which is worth twenty dollars or less is excluded both from assessment and statements. The fact of refusal to furnish the statements required should be noted opposite the name of the owner. This section was amended by act of April 2, 1867, so as to require all ores, etc., low grade or otherwise to be included in the statements, but no ores, quartz or minerals, yielding less per ton than by the amended act, was to be deducted—should be assessed or included in the assessment roll. The form prescribed by the amendatory act is as follows, with same heading:

NAME OF OWNERS.	Description and location of mine.	No. of tons extracted for the 3 months ending—	Value per ton.	Amount per ton deducted as provided by law.	Am't, on which tax is levied.	Total amount of tax.

This section is further amended by the same act, permitting those aggrieved by an assignment to appear before the board of county commissioners and have the same

equalized.[2] By Section *one hundred and seven*, the assessor is required, on or before said second Mondays, to complete his list and deliver it and the sworn statements to the auditor, whose duty it is to extend and foot up the same. By Section *one hundred and eight*, this is required to be done on or before the fourth Monday of each month within which the lists are to be completed, and the roll delivered to the assessor for collection. Section *one hundred and nine*, requires the assessor to publish notice, or in the absence of a county paper, post the same in three public places, and proceed to collect. He shall use due diligence to make personal demand, on or before the second Mondays in March, June, September and December, respectively, after which he need make no further demand, and after the third Monday can receive no more taxes unpaid for the previous quarter, but must report the same delinquent. The delinquent list shall be filed with the auditor for the first quarter of the year on the fourth day of June; for the second quarter on the fourth Monday of the following September; for the third quarter on the fourth Monday in December; and for the fourth quarter on the fourth Monday in March following. By Section *one hundred and ten*, the assessor is authorized to seize upon personal property to satisfy the taxes, while the delinquent list is in his hands, and sell the same on five days' notice. Section *one hundred and eleven*, declares the giving of a false statement under oath or affirmation to be perjury. Section *one hundred and twelve* entitles tax payer to a receipt, descriptive of what the tax was paid on. Section *one hundred and thirteen*, provides for the quarterly settlement between the assessor and auditor, on the sworn statement of the assessor. Section *one hundred and fourteen* prescribes weekly payments by the assessor to the treasurer. By Section one hundred and fifteen the assessor's failure to account and pay over as

required, renders him and his sureties liable for the whole amount of taxes on the quarterly roll. By Sections *one hundred and sixteen* and *one hundred and seventeen*, with an amendment to the latter section,[3] merely authorize the county commissioners to exact from the assessor an additional bond, and prescribes the manner in which the revenue arising from mines shall be distributed. Section *one hundred and eighteen* makes the tax a lien upon the mine or possessory right from the beginning of each quarter, and until the taxes are paid or the mine or claim is sold to satisfy the demand. This section was amended by adding a provision that notice from the assessor to the mine owner, or agent having control of a mine belonging to a corporation, would render such owner or corporation liable for the tax to the extent of the value of the ore, etc., taken from the mine.[4] Sections *one hundred and nineteen and twenty*, refer to the compensation of assessors and treasurers and the apportionment of such allowances.[5] Sections *one hundred and twenty* to *twenty-three* inclusive require the auditor to deliver the delinquent list to the district or prosecuting attorney, who shall be held responsible on his official bond for the faithful performance of his duties. He shall bring suit in the name of the state for the taxes due, before any justice or court of competent jurisdiction—which jurisdiction shall be governed by the amount of tax due. The form of the complaint is prescribed. Section *one hundred and twenty-four* provides that, so far as applicable and not otherwise provided, the laws for the collection of delinquent taxes on real estate and personal property shall apply. What follows only refers to the payment of moneys received by the county treasurer to the state.[6] A statute re-enacting a portion of the foregoing, amending others and repealing conflicting provisions, fixes the legal deductions to be made at the actual cost of extracting the

mineral from the mines; the saving of tailings; of transporting to place of reduction or sale; of reduction or sale, the remainder to be deemed net proceeds; *provided* that the deductions from ore, etc., of the gross value of twelve dollars per ton, or less, shall not exceed ninety per cent.; from that which is over twelve and under thirty dollars, not to exceed eighty per cent.; over thirty and less than one hundred dollars, not to exceed sixty per cent.; and on all of one hundred dollars or over, not to exceed fifty per cent., but allowing an additional deduction of fifteen dollars per ton for ores, etc., worked by the Freiburg or dry process. The form of the quarterly roll is changed to suit the other alterations. Those refusing to furnish statements are excepted from the taxpayers who may have the assessments against them equalized. The collection of taxes under the act is required to be made as taxes on other personal property.[7]

1 Stat. 1866, p. 76.
2 Stat. 1867, p. 160.
3 Act April 2, 1867, Stat. 1867, p. 160.
4 Stat. 1867, p. 161.
5 *Ibid.*
6 Stat. 1864–5, p. 306.
7 Stat. 1871, p. 87.

§ 307. Taxation of borax mines.—"Where borax and soda mines and claims are being worked for borax, for borate of soda, borate of lime, boracic acid, or carbonate of soda, the net proceeds thereof shall be taxed in the manner prescribed by law for taxing the net proceeds of mines."[1]

1 Amendment of § 1 of Act of March 7, 1873; Stat. 1875, p. 137. (See Stat. 1873, p. 187.)

§ 308. Police regulations—Injuries to water companies' property—Security of persons and animals.—The wilful and malicious breaking, cutting, injury or de-

struction of any bridge, dam, canal, flume, aqueduct, reservoir or other structure or conduit erected for hydraulic power, or to conduct water for mining, manufacturing or agricultural purposes, or any embankment, or making or causing to be made, any aperture in either, with intent to injure the same, was, under the territorial government, punishable by fine not to exceed $1,000, or imprisonment in the territorial prison, not less than one, nor more than two years.[1] Persons, companies, and corporations are required to securely fence all open excavations, whether used for mining or otherwise, and where failing to do so may be proceeded against by notice from a justice of the peace or police judge, to whose attention the matter has been brought by a resident of the county; and upon failing to show that the law has been complied with, judgment will be entered against the owner of such excavation for double the cost of fencing the same; and in addition may be fined $100 for each violation of the statute. If the hole, shaft, or excavation has been abandoned, the judge or justice may give notice to the county commissioners, whose duty it will be to fill or fence the same if in their judgment the same is dangerous to persons or animals.

[1] Stat. 1861, p. 87.

VIII. NEW MEXICO.

SECTION 309—Location of lode claims.
310—Record books to be provided.
311—Value of day's labor—Eight-hour law.
312—Validating prior locations.
313—Ejectment to recover mining claims.
314—Repealing clause, saving rights under prior locations.

§ 309. Location of lode claims.—SEC. 1. Any person or persons desiring to locate a mining claim upon a vein or lode of quartz or other rock in place bearing

gold, silver, cinnabar, lead, tin, copper or other valuable deposit, must distinctly mark the location on the ground, so that its boundaries may be readily traced; and post, in some conspicuous place, on such location, a notice in writing, stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof, by reference to some natural object or permanent monument as will identify the claims, and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which such notice is posted; and, *provided* no other record of such notice shall be necessary.

§ 310. **Record books to be provided.**—SEC. 2. In order to carry out the intent of the preceding section, it is hereby made the duty of the probate judges of the several counties of this territory, and they are hereby required to provide, at the expense of their respective counties, such book or books as may be necessary and suitable, in which to enter the record hereinbefore provided for. The fees for recording such notices shall be ten cents for every 100 words.

§ 311. **Value of day's labor—Eight-hour law.**—SEC. 3. In estimating the worth of labor required to be performed upon any mining claims, to hold the same by the laws of the United States, in the regulation of mines; the value of a day's labor is hereby fixed at the sum of four dollars. In the sense of this statute, eight hours of labor, actually performed upon the mining claim, shall constitute a day's labor.

§ 312. **Validating prior locations.**—SEC. 4. All locations heretofore made in good faith, to which there shall be no adverse claims, the certificate of which loca-

tions have been or may be filed for record and recorded in the recorder's office of the county where the location is made, within six months after the passage of this act, are hereby confirmed and made valid. But where there may appear to be any such adverse claim, the said location shall be held to be the property of the person having the superior title or claim, according to the laws in force at the time of the making of the said locations.

§ 313. Ejectment to recover mining claims.—SEC. 5. An action of ejectment will lie for the recovery of the possession of a mining claim, as well as of any real estate, when the party suing has been wrongfully ousted from the possession thereof, and the possession wrongfully detained.

§ 314. Repealing clause, saving rights under prior locations.—SEC. 6. "An act concerning mining claims," approved January 18, 1865, and an act amendatory thereof, approved January 3, 1866; also, an act entitled an act to amend certain acts concerning mining claims in the territory of New Mexico, approved February 1, 1872, are hereby repealed; *provided*, that no locations completed or commenced under said acts shall be invalidated or in anywise affected by such repeal.[1]

[1] Compiled from General Laws of New Mexico (1880). Article xxxviii, Ch. lxxviii, Act of 1876.

IX. OREGON.

SECTION 315—Lode claims—Length and width.
316—Location of claims—Record—Forfeiture.
317—Number of claims on one vein.
318—Annual labor.
319—Duty of county clerks—Recording claims, etc.
320—District laws as to water rights, placer claims and town lots.
321—Ditches and flumes.

SECTION 322—Conveyances—Liens.
323—Mortgages on placer claims.
324—Recording fee.
325—Amendments—Lodes—Local laws—Placer claims—Water rights.

§ 315.—Lode claims—Length and width—SEC. 1.—The extent of lode claims as first established by statute, was three hundred feet in length.

§ 316.—Location of claims—Record—Forfeiture—SEC. 2.—The discoverer of any claim was allowed to hold the same for thirty days by posting a notice at the point of discovery, within which time the claim was to be recorded, provided it was not continuously worked. Failure to work for twelve consecutive months, worked a forfeiture, unless the owner or owners were absent on account of sickness or in active military service, in time of war.

§ 317.—Number of claims on one vein.—SEC. 3.—One claim by location, with an additional one to the discoverer, with as many by purchase as the local laws of the district would allow was the early rule, prior to the United States Statutes.

§ 318. Annual labor.—SEC. 4. Fifty dollars a year was the prescribed amount of work necessary to hold a claim, with the proviso, that corporations owning several claims on one vein or lode, might perform all the necessary work on one claim, for each of the claims so owned.

§ 319. Duty of county clerks—Recording claims, etc.—SEC. 5. On receipt of notice of a district being organized by a miners' meeting, with a description of the boundaries, it is the duty of the county clerk to record the same in a book kept for that purpose. Upon petition of the parties interested he may appoint a dep-

uty, resident of the district or vicinity, who shall record mining claims and water rights, in the order of their presentation, and transmit a copy of the record at the end of each month, to the county clerk, who shall record the same, for which he shall receive one dollar for each claim. The clerk is also required to furnish a copy of the law to his district deputies, who were required to keep the same open at all reasonable times for inspection.

§ 320. **District laws as to water rights, placer claims and town lots.**—SEC. 6. Miners were empowered to make local laws upon these subjects, to be in force within their camps, subject to United States laws.

§ 321. **Ditches and flumes.**—SEC. 7. Were declared to be real estate—the flumes being permanently fixed to the soil.

§ 322. **Conveyances—Liens.**—SEC. 8. The laws relative to sale and transfer of real estate, and the application of liens of mechanics and laborers were made applicable to flumes and ditches, with the proviso that surface or placer diggings might be conveyed by bill of sale and change of possession the same as personal property; but such bills of sale were required to be filed for record within thirty days from the date of their execution, and recorded in a book to be called the record of conveyances of mining claims.

§ 323. **Mortgages on placer claims.**—SEC. 9. Were to be executed, acknowledged and recorded as chattel mortgages.

§ 324. **Recording fee.**—SEC. 10. A fee of one dollar was allowed for recording conveyances and mortgages required to be recorded by the act.[1]

[1] *Gen. Laws, 1843-72, p. 686; Ch. 38, Miscellaneous laws, compiled by Deady & Lane.*

§ 325. **Amendments—Lodes—Local laws — Placer claims—Water rights.**—The following are the latest amendments to chapter thirty-eight, given above: The *length and width of lode claims* are established at "fifteen hundred feet in length, and three hundred feet in width, on each side of such lead or vein." *Mining district laws* not made within two years prior to the passage of the act, are declared null and void. *Work on placer claims*, known as creek, bench and hill claims, lying adjacent, may be done for all the claims owned by one person or company, or on any one of such claims. *Placer claims*, *ditches and water rights* may be represented as it suits the convenience of owners, but *abandonment* and ceasing to exercise ownership for one year, extinguishes all title or interest therein. *Placers* located pursuant to the act of Congress of May 10, 1872, and amendments, is no longer subject to local rules of the district, but shall only be subject to the law governing real estate.[1]

[1] Ap. Oct. 25, 1880—Laws of 1880, p. 26.

X. UTAH.

SECTION 326—Location of lode claim.
327—Defacing notices or records—Destroying monuments.
328—Wrongfully taking or extracting ores.
329—Miners' lien.
330—Records as evidence of notices, rules, etc.
331—County records.
332—Fees of recorders and their duties.
333—Records, public.

§ 326. **Location of lode claim.**—SEC. 1. Citizens and those who have declared their intention to become such, who discover a mineral deposit, etc., bearing gold, silver, tin, platina, copper, or cinnabar, are entitled to one claim *for discovery*, and one by right of location, and no more *on the same lead*.

§ 327. **Defacing notices or records—Destroying monuments.**—SEC. 2. Persons guilty of either of these offenses, or of interfering with any person lawfully in possession of a claim, or of altering, erasing, defacing, or destroying any record kept by a mining recorder, is guilty of a misdemeanor, punishable by fine of not less than twenty-five nor more than one hundred dollars, or imprisonment for not less than ten days, nor more than six months, or both such fine and imprisonment. Justices of the peace have jurisdiction within their counties of such offenses.

§ 328. **Wrongfully taking or extracting ores.**—SEC. 3. Any person wrongfully entering upon any mine or claim and carrying away ores, or extracting or selling ores therefrom, it being the property of another, in addition to civil liability in treble the value of the ores, the party so offending may be arrested on the affidavit of the loser as to the wrongful taking, and held to bail as for the recovery of personal property unjustly detained.

§ 329. **Miner's lien.**—SEC. 4. The performance of work on, or furnishing materials for any mine, pursuant to a contract with the owner of the mine, or any interest therein, entitles the miner, laborer, or material man to a lien on all the interest in such mine of the party contracting for the work or materials. The lien may be enforced in the same manner and with like effect as provided for a mechanic's lien.

AN ACT RELATING TO RECORDS AND MINING RULES.[1]

§ 330. **Records as evidence of notices, rules, etc.**—SEC. 1. Copies of notices of location and of mining *rules* and regulations recorded in the several mining *districts*, are receivable in all the courts of the territory

[1] Approved February 18, 1876.

as *prima facie* evidence of such notices, rules and regulations, if properly certified by the recorders. And the seal of the recorder, certifying to their correctness, shall be *prima facie* evidence of the election, qualification and official character of such mining recorder.

§ 331. **County records.**—SEC. 2. It is made the duty of county recorders to record the mining rules and regulations of the several districts in their counties; and where so recorded, certified copies shall be received as *prima facie* evidence of such rules and regulations.

§ 332. **Fees of recorders and their duties.**—SEC. 3. The fees of mining recorders for recording instruments and making copies are the same as those allowed county recorders for like services. It is the duty of the mining recorder on tender of his fees to supply certified copies of the records; for failure so to do, or receiving larger fees than allowed by law, he shall be deemed guilty of a misdemeanor, and subject to the penalties against public officers in Section 20 of an act entitled "An act to regulate fees and compensation for official and other services in the territory of Utah," passed February 20, 1874.

§ 333. **Records, public.**—SEC. 4. "Recorders of mining districts shall, for the purposes of this act, be deemed public officers, and the records in their custody shall be deemed public records, and they are hereby required to keep an official seal.[1]

[1] Compiled Laws of Utah, p. 398; Acts approved Feb. 16, 1872.

XI. WASHINGTON TERRITORY.

§ 334. **Water rights—Right of way for ditches, etc.**—*The appropriation of the water of public streams for mining and other purposes is authorized by statute.*

A right of way for canals, ditches, flumes, aqueducts, reservoirs, etc., may be acquired by condemnation and paying for the land taken, the price assessed by commissioners. It is provided that the assessed value of *benefits* accruing from the improvement may be deducted from the assessed value of land taken from the person benefited, or from the damages resulting from such taking, in fixing the amount due to the person whose property is so condemned.[1]

[1] Act approved November 14, 1879; Laws of 1879, p. 124.

XII. WYOMING.

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363—Miners' liens.
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§ 335. **Location of lode claims—Length.**—SEC. 1. Provides for locations of 200 feet in length on lodes, ledges or veins of quartz or other rock bearing "gold, silver, cinnabar or copper," and where the discoverers are *bona fide* residents of the territory, an extra 200 feet for discovery.

§ 336. **Location notice.**—SEC. 2. The notice placed on the claim is required to contain the name of the lode, the direction and boundaries, and the name of the claimant. A copy of the notice must be filed in the office of the district recorder, or of the register of deeds of the county for record, within fifteen days after date of location.

§ 337. **Annual labor.**—SEC. 3. The annual assessment required, until title is obtained from the government, is fifty dollars' worth of labor and improvements for each 200 feet.

§ 338 **Tenants in common on same lode.**—SEC. 4. Owners of several claims on same lode considered as tenants in common, and may perform labor on one claim for all.

§ 339. **Segregated claims.**—SEC. 5. Where the locations on the same lode are claimed as "segregated," the tenancy in common and commutation of labor does not apply as in preceding section. It must be performed on each claim.

§ 340. **Extensions.**—SEC. 6.—The discoverer of an extension of a lode holds the same by prior right, not-

withstanding the previous posting of notices claiming such extension.

§ 341. **Lateral surface ground.**—SEC. 7. One hundred feet on each side of lode is allowed for working purposes, not to interfere with rights of others to prospect for distinct veins.

§ 342. **Right of way.**—SEC. 8. Persons working or developing mines have the right of way across all other claims for hauling quartz or other necessary materials.

§ 343. **Cross and intersecting veins.**—SEC. 9. Where veins cross, intersect or unite, priority of record shall govern. But in no case shall the claimant be allowed to diverge from the general direction of his lode to enter upon that of another. Each shall follow his vein extending most nearly in the general direction of the lode according to the original location.

§ 344. **Locations on distinct parts of same lode.**—SEC. 10. "Where two ledges or lodes are discovered at any distance apart, * * * known by different names, and it shall subsequently be proven that the *two* are *one* and the same ledge or lode," the first locator having first recorded is entitled to possession; but the parties evicted are not liable for ores extracted and disposed of previous to the proven unity.

§ 345. **Tunneling for blind lodes.**—SEC. 11. Tunnel claims may be located, "but the right of way of such tunnel shall not exceed five hundred feet at right-angles to the tunnel. All persons owning in said tunnel shall have the right to claim two hundred feet each on any and all ledges or lodes such tunnels may tap;" unless such lodes have been previously discovered and worked according to section three of the act.

§ 346. **Limitations upon rights acquired by tunnel discovery.**—SEC. 12. Discovery by tunnel does not authorize the extra claim of two hundred feet. The total number of feet held on any one lode, by tunnel companies, shall not exceed three thousand feet.

§ 347. **Intersection of tunnel with prior location.**—SEC. 13. When a tunnel strikes a lode already worked, the owners of the tunnel may extract the ore until the prior locators sink a shaft from the surface into the tunnel, proving identity, after which the tunnel shall remain open and free as a drain to the lode or mine.

§ 348. **Tunnel for development—Right of way.**—SEC. 14. Tunnels may be driven for the development of mines located on the surface, and for that purpose the right of way is accorded. But they are not to interfere with the right to prospect—not within fifty feet. A notice stating the object of the work should be placed at the mouth of the tunnel, and work done therein will be considered as done on the claim.

§ 349. **Ditch or water sites.**—SEC. 15. Claims of this kind require a notice at the point on the stream where the water is taken, stating the objects and purposes of the ditch; a survey of the ditch to its mouth, where a similar notice must be placed.

§ 350. **Record of water site.**—SEC. 16. Notice of the claim of water privilege and affidavit of survey filed with the register of deeds within fifteen days after posting first notice.

§ 351. **Time for completing ditch.**—SEC. 17. One-tenth of the entire length must be excavated in six months and one-half in twelve months, when the ditch becomes real estate.

§ 352. **Right of way for water.**—SEC. 18. Persons conducting water have the right of way over and across any road, ditch or mine, provided the water be so controlled and guarded as not to injure others.

§ 353. **Mill sites.**—SEC. 19. Mill sites may be located five hundred feet square by posting notices at each corner of the claim, describing the objects and purposes thereof, having the same surveyed, and a plat recorded as of a mining claim. The site must be improved to the value of five hundred dollars, in six months after location.

§ 354. **Formation of mining districts.**—SEC. 20. Miners may form districts not to exceed twenty miles square, with boundaries fully described and defined by natural objects, and the miners have power to make local laws and regulations not inconsistent with the laws of the United States or the territory.

§ 355. **Mining recorders.**—SEC. 21. May be elected in the districts, whose duties shall be to keep a correct record of miners' meetings and record notices of claims filed in his office.

§ 356. **Fees of recorder—Further duties.**—SEC. 22. The recorder shall receive at least one dollar for recording notices, to be transmitted to the register of deeds with copy of the notice, and such other fees as prescribed by district laws. Abstracts of district records should be forwarded to the register of deeds every four months.

§ 357. **Placer mines—Local laws—Records.**—SEC. 23. The holding and working of placers governed by local laws; but all records, whether of quartz or placer mines, shall be valid and binding according to priority of filing.

§ 358. **Conveyances.**—SEC. 24. Of quartz mining property are required to be by deed as of real estate.

§ 359. **Forfeiture excused.**—SEC. 25. In case of hindrance from work by Indians, so that life is endangered, failure to work is excused.

§ 360. **Forfeiture — Relocation.**—SEC. 26. All the rights secured by compliance with this chapter may be forfeited when no longer held by such compliance, by filing with the recorder a notice of relocation, setting forth distinctly why such relocation is made.

§ 361. **Penal provisions—Destroying notice.**—SEC. 27. Any person directly engaged, interested or implicated in destroying, removing, defacing, or altering any notice of placer, quartz, or ditch claim, or other claim of similar character, unless it be subject to relocation, is guilty of a misdemeanor, punishable by a fine of not less than one hundred, nor more than three hundred dollars, or by imprisonment not less than one, nor more than three months, or both such fine and imprisonment.

§ 362. **Ante-dating notice.**—SEC. 28. Dating a notice of a date prior to putting up is made a misdemeanor, punished by fine not exceeding $100, or imprisonment not exceeding six months.[1]

[1] Laws of Wyoming, 1869, p. 307; act approved December 2, 1869.

§ 363. **Miners' liens.**[1]—By Section *one* of the act, *miners and laborers* indicated, are entitled to a lien for the amount due for such labor rendered at the request of the owner of any quartz lode, coal bank or mine, on demand and refusal to pay. Section *two* provides in the same manner for *mechanics and material men*. By Section *three*, the same procedure is prescribed, so far as applicable, as for securing mechanics' liens.[2] By section *four*, when any sum exceeding $10 has been due and unpaid for labor, as specified in Section one, a notice may be filed by the creditor in the county recorder's office at any time

within thirty days after the last work. The notice should state the fact and kind of labor performed (naming the debtor); that it was performed under contract (stating the substance); the times of commencement and cessation; the amount due and unpaid, with a description of the mine or coal bank. The statement must be verified, and when filed shall be recorded in the "lien book" as required in case of mechanics' liens. Section *five* applies the provisions of Section four to liens claimed under Section two. Section *six* provides that on the filing of the foregoing notice the lien shall hold as against owners from the commencement of work, or furnishing materials, and also as against purchasers subsequent to the same time. Section *seven* permits suits to be commenced within one year after filing notice. Section *eight* applies the law to owners of *oil wells* or *springs*.[3]

1 Ch. 43, an act giving liens to miners and others laboring in mines, coal banks and upon oil land, approved December 10, 1869.

2 Ch. 44, laws Wyoming, 1869, p. 406.

3 Laws Wyoming, 1869, p. 404.

§ 364. Expenditures—Abandonment—"Salting"—Assessment of non-residents.—By an act approved December 16, 1871,[1] some miscellaneous provisions were enacted. It was enacted that expenditures for labor and improvements to the amount of $1,000 should exempt lode claims from relocation unless abandoned, and that such claims should not be considered abandoned so long as the same were represented by the owner or his agent, or such representation was rendered impracticable by the owner or agent being driven from the district by Indians. The crime of "*salting*" a mine or mineral, was made punishable by fine of not less than $100, nor more than $5,000, or by imprisonment in the penitentiary not less than thirty days, nor more than three years, or both such fine and imprisonment. The interests of non-resident co-owners

of mines, who failed or refused for eight months to pay assessments for working the same, was rendered subject to sale for such delinquency on thirty days' notice, in the nearest newspaper, and posting notice on the claim for thirty days, giving the amount due, date of notice, and date of sale. Property thus sold is subject to redemption within six months, by paying the costs of advertisement and sale, the assessments, and 10 per cent. upon the purchase money. All acts or parts of acts conflicting with this are repealed.[2]

[1] An act to provide for the development of the mining resources of the Territory of Wyoming.

[2] Laws of 1871, p. 114.

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